ARTICLES

EVOLVING CONCEPTIONS OF EQUALITY UNDER TITLE VII: DISPARATE IMPACT THEORY AND THE DEMISE OF THE BOTTOM LINE PRINCIPLE

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INTRODUCTION

When Congress outlawed employment discrimination in Title VII of the Civil Rights Act of 1964,[1] it neither specified a particular definition of discrimination,[2] nor articulated a clear conception of the equality[3] it hoped to secure for those groups protected by the Act.[4] Congress conceived of the goals of the legislation in broad terms, however, and these goals were exceedingly

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I wish to thank Peter Shane for his insightful critique of this article from its earliest stages. I am also indebted to my colleagues David Baldus, William Buss, Robert Clinton, and Michael Green for their thoughtful comments and to Natalie Kanellis and Diane Ratekin for their research assistance.

1. 42 U.S.C. § 2000e (1976).

2. The basic prohibitory provisions of Title VII, sections 703(a)(1) and 703(a)(2), 42 U.S.C. § 2000e-2(a)(1), (2) (1976), *reprinted infra* text accompanying note 94, are cast in general terms and do not provide a precise definition of the discrimination encompassed by the Act. *See* 1964 U.S. CODE CONG. & AD. NEWS 304.

3. *See infra* text accompanying notes 60–62, discussing the differing conceptions of equality that underlie the two basic theories of liability under Title VII.

4. Title VII outlaws discrimination against an individual on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1976). Discrimination based on religion presents unique legal questions and will not be addressed in this article. For convenience, the terms "minority group member" and "minorities" are used in this Article to refer to women and to individuals belonging to racial and ethnic groups that have historically been subjected to discriminatory treatment, including blacks and Hispanics. Treating discrimination against women and certain ethnic and racial minorities together makes economic sense. Economist Lester Thurow classifies three ethnic groups—blacks, Hispanics, and American Indians—as "economic minorities" based on their relatively poor economic standing compared to

ambitious. Congress sought to improve the lot of traditionally victimized minorities both by eliminating blatant injustices stemming from intentional discrimination and by creating employment opportunities that would provide the economic power to propel these groups into the mainstream of American society.[5] Equality in the workplace was heralded not only as a boon for minority members but as a potent device to improve the nation's economy by cleansing the labor market of distortions wrought by unjust discrimination.[6]

Although the change in the American workplace that would inevitably occur by eliminating race and sex discrimination must have been recognized as enormous even in 1964, proponents of the Act provided assurances that the traditional prerogatives of management would be left undisturbed to the greatest extent possible.[7] The eradication of discrimination would in the end be good for business and would not unduly involve the government in private decision making. Not unexpectedly, the implementation of Title VII has uncovered profound tensions by attempting simultaneously to wipe out discrimination while minimally disrupting private decision making.

The tension is most striking in what is known as "disparate impact cases" in which an employer is charged with unintentional discrimination.[8] Of fundamental importance in the implementa-

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other ethnic groups. The other major economic minority, based on Thurow's analysis, is women. L. THUROW, THE ZERO SUM SOCIETY 184–87 (1980).

Entities subject to Title VII's proscriptions are employers, employment agencies, labor organizations, and joint labor-management committees controlling apprenticeship or other training or retraining programs. 42 U.S.C. § 2000e-2(a) to 2(d) (1976). For convenience, this Article refers only to employers.

5. HOUSE JUDICIARY COMM. REPORT, ADDITIONAL VIEWS OF REPS. MCCULLOCH, LINDSAY, CAHILL, SHRIVER, MACGREGOR, MATHIAS AND BROMWELL, H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963) [hereinafter cited as H.R. REP. NO. 914], *reprinted in* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2122, 2147–51 [hereinafter cited as EEOC LEGISLATIVE HISTORY]. *See also* S. REP. NO. 867, 88th Cong., 2d Sess. 6–8 (1964). The legislative history of Title VII is discussed *infra* notes 99–113 and accompanying text. For more comprehensive treatment of Title VII legislative history, see Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968); Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966); Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: the Fallacy of Connecticut v. Teal*, 20 HARV. J. ON LEGIS. 99, 117–32 (1983) [hereinafter cited as Blumrosen, *The Group Interest Concept*]

6. "There is considerable evidence to demonstrate that permitting people to be hired on the basis of their qualifications not only helps business, but also improves the total national economy." 110 CONG. REC. 13,088 (1964), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3107 (remarks of Sen. Humphrey).

7. H.R. REP. NO. 914, at 29, *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 2150. *See also infra* text accompanying note 242.

8. For discussion of disparate impact theory, see *infra* text accompanying notes 72–89, 143–93.

tion of Title VII has been the emergence under administrative and judicial guidance of two major techniques for avoiding Title VII disparate impact liability. The policy[9] of the Equal Employment Opportunity Commission (EEOC) and other federal agencies responsible for promoting equality in the work force generally allows an employer to protect itself from government initiated suits challenging unintentional discrimination either by engaging in affirmative action[10] or by validating[11] any hiring or promotion method that has a disparate impact[12] on minorities.

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9. *See* the Uniform Guidelines on Employee Selection Procedures, issued jointly in 1978 by the Equal Employment Opportunity Commission, Civil Service Commission, Department of Justice, and Department of Labor. 29 C.F.R. § 1607 (1978). The Uniform Guidelines have also been adopted by the Department of the Treasury for use in its revenue sharing program with state and local governments. 31 C.F.R. § 51.53(b) (1983). The development of the federal enforcement agencies' policy is discussed *infra* text accompanying notes 198–209.

10. The term "affirmative action" generally has been used to describe the use of race-conscious plans or policies designed to advance the employment status of minorities or to overcome the effects of past or present discrimination. *See* EEOC Affirmative Action Guidelines, 29 C.F.R. § 1608.1(c) ("Affirmative action . . . means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity"); Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531, 534–35 (1981) ("[A]ffirmative action . . . goes beyond the mere adoption of a passive, prospective, nondiscriminatory principle and focuses on active implementation of specific race-conscious remedies that are designed to promote the status or number of discriminatees in a given setting").

11. The concept of validation "involves the establishment of the relationship between a test instrument or other selection procedure and performance on the job." Uniform Guidelines on Employee Selection Procedures, Supplementary Information, 43 Fed. Reg. 38,290, 38,291 (1978). In Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17, 18, Professor Lerner defines validation as: "the scientific way of determining whether a selection device actually does what it is intended to do: to make reliable and meaningful distinctions between individuals on the basis of their ability to perform particular tasks with competence and/or to function successfully in particular jobs." *See also* Green, *A Primer of Testing*, 36 AM. PSYCHOLOGIST 1001, 1006–07 (Oct. 1981). The Uniform Guidelines have approved three methodological approaches to validation: (1) *criterion-related validity* using empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of job performance; (2) *content validity* using data showing that the content of a selection procedure, often a test, is representative of important aspects of job performance, *e.g.*, a typing test for a typing job; and (3) *construct validity* using data showing that the selection procedure measures the degree to which candidates possess characteristics that have been determined to be important for successful job performance, such as leadership ability. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1596, 1607.5(B), 1607.16(D)–(F) (1983).

12. The courts have never endorsed a unitary statistical definition of adverse impact or effect. Determining the proper methods to measure and prove adverse group impact has given rise to a host of difficult legal and statistical questions, *see infra* note 317, including the bottom line controversy addressed in this Article. The federal enforcement agencies in the Uniform Guidelines on Employee Selection Procedures have embraced what is known as the "4/5ths" rule or the 80% rule, as a practical rule of thumb to determine adverse impact. 29 C.F.R. § 1607.4(D) (1983). Under the

The EEOC policy requires that employers discontinue use of selection procedures, such as hiring tests, that have an adverse effect on minority groups, unless such devices have been validated in accordance with professionally accepted methods.[13] As an alternative to validation, however, the employer may choose to implement an affirmative action plan[14] that eliminates the adverse impact on minorities caused by the unvalidated selection device. Thus, validation and affirmative action each serve as a compliance technique by which the employer discharges its statutory obligation to provide equal job opportunities.

While these two compliance techniques are neither incompatible nor mutually exclusive, they do reflect differing orientations towards achieving the statutory goal of equality in employment for protected groups. Affirmative action focuses on expanding job benefits for previously excluded groups in the relatively short run and achieving adequate representation of these groups in all employment sectors. Validation, on the other hand, centers on eliminating employment practices and policies perceived as illegitimate because they are not sufficiently related to successful job performance or other business exigencies to justify their adverse impact on minorities.

At first blush, affirmative action appears to require decision makers to be color conscious, while validation seems to be a method for enforcing color blindness. In fact, the direction of the two techniques cannot be so sharply contrasted and may be distinguished only by more subtle differences in the operation of each technique. Both techniques are consciously designed to upgrade

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4/5ths rule, as applied in the Guidelines, the rates of hire or promotion of minorities are compared to the rates for non-minorities. If the minority rate is less than 80% of the non-minority rates, adverse impact is deemed established. For more detailed explanations of the operation of the 4/5ths rule, see Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C. CENT. L.J. 1, 17–18 (1980) [hereinafter cited as Blumrosen, *The Bottom Line Concept*]; Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 CATH. U.L. REV. 605, 627–30 (1979).

The 4/5ths rule, like the bottom line focus it incorporates, has been the subject of controversy. Criticism can be found in C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 1.5, at 48–51 (1980), and Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978). For a defense of the 4/5ths rule, see Blumrosen, *The Bottom Line Concept, supra*, at 12–20.

For more comprehensive treatment of the difficulties in determining adverse impact in disparate impact cases, see D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION § 2.23 (1980); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 318–30 (1983).

13. Uniform Guidelines on Employee Selection Procedures, Supplementary Information, 43 Fed. Reg. 38,920, 38,921 (1978), explains the interaction between the two compliance techniques of validation and affirmative action.

14. *Id.*

the status of minorities in the workplace beyond simply assuring that decisionmaking is untainted by racial bias.[15] To accomplish this overall objective, affirmative action seeks to achieve "substantive" equality, measured principally in terms of numbers of jobs and other employment benefits secured by minorities.[16] The process-oriented technique of "validating" certain employment practices that produce group adverse impact, on the other hand, is more closely allied with an ideal of "merit selection" that relegates equality of results to a beneficial by-product of fair procedures.

Predictably, each technique has had its critics. For example, the current Administration has taken a strong stand against affirmative action, claiming that a direct effort to create employment opportunities for certain protected groups "needlessly creates a caste system in which an individual must be unfairly disadvantaged for each person who is preferred . . . [and] inevitably introduce[s] a divisive influence into the work place, the community, and the country as a whole."[17] In contrast, opponents of validation as the exclusive compliance technique fear that, without the additional, direct creation of employment opportunities afforded by affirmative action, an "impenetrable" barrier to the basic objective of the advancement of minorities could remain.[18] Affirmative action is thus criticized as being unfair, validation as inadequate.

The 1964 Congress understandably gave little thought to any theoretical tension that might exist between the goals of achieving equality in the distribution of jobs through affirmative action—so-called "bottom line" equality—and that of "validating" employment practices and policies to produce economic benefits for all.[19]

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15. For discussion of validation as a technique that is tied to a group-oriented conception of equality, see *infra* text accompanying notes 292–313.

16. Not all affirmative action efforts directly produce an increase in the number of minorities or women who secure jobs or receive other employment benefits. For example, an affirmative action recruiting program may consist only of attempts to expand the pool of applicants in the hope that more minority members will ultimately be selected. Even if such hope is unrealized, the effort may nevertheless be aptly designated as an affirmative action plan. This Article focuses, however, on those affirmative action plans that are used by the employer as a basis for making employment decisions. *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.2(C) (1983) (affirmative action recruiting plans are not "selection procedures" subject to Guidelines).

17. Address by William Bradford Reynolds, Assistant United States Attorney General, Civil Rights Division, The Fourth Annual Conference on Equal Employment Opportunity, "The Focus of Equal Employment Opportunity Programs Under the Reagan Administration," at 6 (Oct. 20, 1981).

18. Comments of Eleanor Holmes Norton, Excerpts From Transcript of EEOC Commissioners Meeting (Dec. 22, 1977), DAILY LABOR REP. (BNA) No. 43, at E-4 (Mar. 3, 1978). *See infra* note 334.

19. In 1964, the technique of validation was in its infancy, *see* United States v. H.K. Porter Co., 296 F. Supp. 40, 75–76 (N.D. Ala. 1968) (discussing cultural bias of

It was the more conspicuous forms of intentional discrimination that animated the legislative initiative in 1964, and, in the first decade after Title VII's enactment occupied the energy and time of the courts and of the EEOC.[20]

Now that many of the most patent abuses have been eliminated,[21] the debate over the fundamental meaning of equality in Title VII and the resulting scope of employer liability has reemerged with renewed vigor.[22] A recent significant judicial entry in the debate is a little celebrated 5-4 decision[23] by the Supreme Court that, curiously, finds the liberal members of the Court[24] on the side of validation, and the traditionally conserva-

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aptitude tests and techniques of test validation); 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 75.23 (1983); Wigdor, *Psychological Testing and the Law of Employment Discrimination*, in ABILITY TESTING: USES, CONSEQUENCES, AND CONTROVERSIES, Part II, at 39, 61 (1982), and the concept of group interests reflected in the bottom line principle was not fully developed. Blumrosen, *Affirmative Action in Employment after* Weber, 34 RUTGERS L. REV. 1, 13 (1981) [hereinafter cited as Blumrosen, *Affirmative Action*]; Blumrosen, *The Group Interest Concept, supra* note 5, at 108–10. Little of the current terminology associated with validation and the bottom line principle can be found in the Title VII legislative history dealing with ability testing. 110 CONG. REC. 7247, 9024–25, 11,251, 13,492–13,505, 13,724, *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3129–63.

20. During the first 10 years of Title VII's operation, the vast majority of charges filed with the EEOC sought individual relief in connection with an intentionally discriminatory discharge, failure to hire, or failure to promote. Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L.J. 519, 525 (1978). Indeed, it is not impossible to find examples of current cases that involve egregious forms of intentional discrimination. *E.g.*, Hatton v. Ford Motor Co. (E.D. Mich. 1981) (black male plaintiff subjected to cruelty and scorn of racist supervisors suffered consequent stroke and other physical harm); Segar v. Civiletti, (D.D.C. 1981) (black DEA agents more often given undercover assignments than white agents); O'Connell v. Liberty Mutual Ins. Co., 499 F. Supp. 313 (S.D. Tex. 1980) (employer permitted male but not female adjusters and supervisors to attend law school).

21. "The overt and blatant bigotry that marked the leading civil rights cases of an earlier year seldom supplies the gravamen of cases which now reach the appellate courts." Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1013 (D.C. Cir. 1981). *See also* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 412 (1982) (Marshall, J., dissenting); Blumrosen, *The Bottom Line Concept*, *supra* note 12, at 1–2.

22. *See, e.g.*, Belton, *Discrimination and Affirmative Action*, *supra* note 10, at 531; Blumrosen, *Affirmative Action*, *supra* note 19, at 11-14; Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982); Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17; Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980); Schatzki, United Steelworkers of America v. Weber: *An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51 (1980); Walker, *The Exorbitant Cost of Redistributing Injustice: A Critical View of* United Steelworkers of America v. Weber *and the Misguided Policy of Numerical Employment*, 21 B.C.L. REV. 1 (1979).

23. Connecticut v. Teal, 457 U.S. 440 (1982). The *Teal* decision is also discussed *infra* text accompanying notes 29–37 & 229–46.

24. Justice Brennan wrote the majority opinion joined by Justices White, Marshall, Blackmun, and Stevens.

tive members[25] on the side of the bottom line principle, despite that principle's heavy reliance on affirmative action.

The bottom line principle is relevant in a relatively small, but conceptually critical, class of cases[26] in which an inconsistency exists between the predictable effect of a challenged practice or policy and the actual pattern of hiring or other personnel practices in the defendant's workplace. In these bottom line cases, use of a selection device that would normally result in a lower hiring or promotion rate of minorities does not, in fact, have such an exclusionary effect. The minority group as a whole is not disadvantaged in these cases because other selection procedures, either intentionally designed,[27] or operating fortuitously,[28] offset the expected adverse impact. Despite the offset, however, individual minority members may still claim to be victims of discrimination if they have been excluded by the challenged selection procedure.

The bottom line problem arises, for example, when an employer who hires only high school graduates for a given position decides to engage in affirmative action to offset the selection of fewer blacks which can be anticipated as a result of the educational disqualification. The operation of the affirmative action plan results in the hiring of a larger percentage of black applicants with high school diplomas than white applicants with the same degree. As a result of the affirmative action plan, the employer's overall hiring figures reflect the percentage of blacks in the available labor force. Because the affirmative action offset does nothing to aid the black applicant who has never finished high school, however, such an applicant may still maintain that the educational requirement violates the Title VII prohibition against the use of unjustified neutral policies that produce discriminatory effects. The critical issue thus becomes whether Title VII should prohibit only unjustified discriminatory procedures that actually result in the loss of employment opportunities in the defendant's work force—the bottom line approach—or whether Title VII

25. Justice Powell wrote the dissent, joined by Chief Justice Burger and Justices Rehnquist and O'Connor.

26. For additional explanations of the operation of the bottom line principle, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1191–93 (1976); D. BALDUS & J. COLE, *supra* note 12, at § 1.231; Blumrosen, *The Bottom Line Concept, supra* note 12, at 4; Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 25–32 (1977).

27. A bottom line balance may be achieved by the employer's conscious use of affirmative action to offset the adverse impact of tests or other selection devices on minorities. For discussion of the offsetting capacity of affirmative action programs, see *infra* text accompanying notes 316–30.

28. For discussion of the operation of fortuitous offsetting selection devices, see *infra* text accompanying note 330.

more broadly warrants justification of any selection device that independently has a tendency to produce discriminatory selection patterns.

The Supreme Court rejected the bottom line principle by a narrow margin in *Connecticut v. Teal*.[29] *Teal* involved the lawfulness of an unvalidated written examination that state employees were required to pass before being placed in a pool of those eligible for promotion.[30] Although blacks failed the test in disproportionate numbers,[31] offsetting affirmative action efforts[32] were employed at the late stages of the promotional process.[33] This offsetting procedure resulted in a promotion rate for blacks who had survived the screening process far in excess of the promotion rate for whites in the same position.[34] Affirming the Second Circuit,[35] the Supreme Court refused to accord any weight to the bottom line promotion results and held that the existence of an appropriate racial representation[36] in defendant's ultimate selections would neither prevent plaintiff from establishing its prima facie case of adverse impact, nor provide a defense to the employer.[37]

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29. 457 U.S. 440 (1982). The case was decided 5–4. For a listing of the Justices in the majority and dissent, see *supra* notes 24–25.

30. The plaintiffs in *Teal* were four black female employees of the Department of Income Maintenance of the State of Connecticut, who had been promoted provisionally to the position of supervisor. Plaintiffs sought to attain permanent status as supervisors after working in that capacity. The first step in attaining a permanent position was to secure a passing score on a written examination. Plaintiffs failed the exam and were not allowed to continue in the selection process. 457 U.S. at 442–44.

31. The passage rate for black candidates was 54.17%; the rate for white candidates was 79.54%. *Id.* at 443 n.4.

32. In its brief before the Supreme Court, the State of Connecticut belatedly denied that it had implemented any affirmative action program in connection with the promotion process. The state claimed that the promotion process was based solely on merit and qualifications, as apparently required by state law. Brief for Petitioners at 4 n.1, Connecticut v. Teal, 457 U.S. 440 (1982). The Court of Appeals, however, had characterized defendant's post-exam procedures as "affirmative action" designed to insure that a significant number of minority members were promoted to supervisors, Teal v. Connecticut, 645 F.2d 133, 135 (2d Cir. 1981), *aff'd. sub nom.* 457 U.S. 440 (1982), and the disproportionately high selection rate of minorities is understandable only as a product of affirmative action. The Supreme Court, however, found no need to resolve the dispute, rejecting the bottom line principle even when the employer had admittedly engaged in affirmative action to produce a balanced overall result. Connecticut v. Teal, 457 U.S. at 444 & n.5.

33. The plaintiffs filed suit five months after taking and failing the written examinations. More than a year after the suit was filed, defendant made the promotions from an eligibility list generated by the written examination. 457 U.S. at 444.

34. Of the blacks who participated in the selection process, 22.9% were promoted; only 13.5% of the white candidates were promoted. *Id.* at 444.

35. 645 F.2d 133 (2d Cir. 1981), *aff'd sub nom.* 457 U.S. 440 (1982).

36. An examination of the applicant flow data, presented in *Teal*, 457 U.S. at 443 n.4, shows that the number of blacks finally selected for the supervisory positions was more than sufficient to counteract the disparate impact of the written exam. The promotion rate for blacks was close to 170% of that for whites. *Id.* at 444 n.6.

37. *Id.* at 452.

Despite its apparent interventionist posture on behalf of minority interests,[38] *Teal* ultimately may not prove to be a victory for civil rights advocates. The majority's willingness in *Teal* to allow the fair procedure concerns of individual minority workers to undermine the employer's successful affirmative action efforts conflicts with the tenor of the Court's earlier landmark decision in *United Steelworkers v. Weber*,[39] which had greatly encouraged voluntary affirmative action plans by employers.

By requiring even "affirmative action" employers to validate their tests or be subject to liability for unintentional discrimination, *Teal* reduces the incentive for employers to engage in affirmative action.[40] The strength of the disincentive resulting from *Teal*'s insistence on validation is an empirical question that may be definitively answered only by a greater understanding of the reasons employers engage in affirmative action.[41] However, any incentive employers may have had prior to *Teal* to implement affirmative action plans to shield their use of unvalidated, objective selection devices has now been eliminated. At the same time, *Teal* elevates validation to a preferred status, making it the sole compliance technique that provides employers with complete immunity from disparate impact claims.[42]

The overall objective of this Article is to assess the relative priority that should be given to achieving "bottom line" equality and to encouraging use of "valid," nondiscriminatory employment procedures. The relative efficacy[43] of the two approaches is explored as well as the implications of such a value choice on the scope of permissible management prerogatives.[44] The Article criticizes the Court's disapproval of the bottom line approach in *Teal* because such outright rejection is hard to reconcile fully with the balancing of values that might be thought implicit in the disparate impact theory of liability and is not otherwise justified by policy considerations.

To understand and critique the Court's decision in *Teal*, it is

38. Civil rights groups have generally disapproved of the bottom line principle and have endorsed a requirement of validation of individual selection components. *See, e.g.*, Brief for the Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* in Support of Respondents at 7–10, Connecticut v. Teal, 457 U.S. 440 (1982); Brief of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as *Amicus Curiae* at 2–4, Washington v. Davis, 426 U.S. 229 (1976).

39. 443 U.S. 193 (1979), *reh'g denied*, 444 U.S. 889 (1979). *Weber* is discussed *infra* text accompanying notes 248–54.

40. For a fuller discussion of the effect of *Teal* on affirmative action, see *infra* text accompanying notes 314–32.

41. *Id.*

42. *See infra* text accompanying notes 229–62.

43. *See infra* text accompanying notes 314–40.

44. *See infra* text accompanying notes 341–46.

necessary preliminarily to analyze in considerable depth the Court's views of the equality guarantee of Title VII. Thus, Part I explains the differences between the two judicially recognized theories of liability under Title VII—the disparate treatment and disparate impact theories.[45] It examines how two such divergent theories evolved, especially given the differences in the conception of equality which each seems to reflect.[46]

Part II explores the conceptions of equality that Title VII embodies through an analysis of the "bottom line" cases.[47] These cases highlight what should be a critical point in the development of Title VII compliance techniques. The point is that the disparate impact theory of liability cannot be fully explained without accepting the conclusion that some group-oriented conception of equality is appropriate under Title VII. Yet such a group conception of equality is itself not exclusively associated with a single compliance technique.[48] Rather, a judicial preference for a particular compliance technique must find its justification in an assessment of the likely impact that the technique will have on employer behavior and, ultimately, on the attainment of equality for protected groups.[49] Validation as the preferred compliance technique has not been so justified by the Supreme Court. Nor can speculation as to the effects of the *Teal* decision readily supply that justification.

I. THE DIVERGENT THEORIES OF LIABILITY UNDER TITLE VII

A. *Disparate Treatment v. Disparate Impact*

The Supreme Court has consistently held that a case of employment discrimination under Title VII may proceed under two strikingly different, although not incompatible, theories of liability.[50] It is hornbook law that an employer not only is forbidden to

45. *See infra* text accompanying notes 50–113.
46. *See infra* text accompanying notes 114–93.
47. *See infra* text accompanying notes 194–347.
48. *See infra* text accompanying notes 263–313.
49. *See infra* text accompanying notes 314–47.
50. In International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977), the Supreme Court described the two theories of liability:

> "Disparate treatment". . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . .
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> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justi-

treat minority group members less favorably than other employees through intentionally discriminatory practices, but may also be prohibited from using racially neutral practices or policies that produce discriminatory effects.[51] In the former, "disparate treatment" case, the absence of intentional discrimination is enough to insulate the defendant employer from liability.[52] The plaintiff who relies on a disparate treatment theory is aided by judicially-created evidentiary presumptions,[53] but ultimately must establish that he or she is a victim of intentional employer action based on race.[54] In contrast, in a disparate impact or "effects" case, a plaintiff need not establish an employer's intent to discriminate.[55] Instead, in such cases the harm that must be justified or remedied is the adverse impact[56] or harmful effect of neutral employment practices on the protected group. The Supreme Court has described the touchstone of legality in disparate impact cases as the existence of "business necessity."[57] Reaching beyond intentional unequal treatment of particular individuals, the effects test attempts to eradicate all unnecessary or arbitrary barriers to equal

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> fied by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. . . . Either theory may, of course, be applied to a particular set of facts. [Citations omitted.]

See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 n.5 (1981); Furnco Constr. Co. v. Waters, 438 U.S. 57, 581–82 (1978) (Marshall, J., concurring in part and dissenting in part).

51. For general treatment of the two theories of liability, see D. BALDUS & J. COLE, *supra* note 12, at § 1.2; D. BELL, RACE, RACISM AND AMERICAN LAW § 9.6-.7 (2d ed. 1980); 3 A. LARSON & L. LARSON, *supra* note 19, at § 65.00; B. SCHLEI & P. GROSSMAN, *supra* note 12, at 1–12; C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 12, at §§ 1.6–.7.

52. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252–56 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 & n.18 (1973).

53. *See* discussion of allocation of burden of persuasion and production in disparate treatment cases *infra* notes 67–71 and accompanying text.

54. Title VII does not allow employers to justify any *explicit* disparate treatment based on race. Section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1), however, permits an employer to hire an individual "on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." The BFOQ exception does not, however, encompass discrimination based on race or color.

55. Dothard v. Rawlinson, 433 U.S. 321, 328–29 (1977); International Bhd. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Peters v. Lieuallen, 693 F.2d 966, 968–69 (9th Cir. 1982); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 990 n.7 (5th Cir. 1982); McKenzie v. Sawyer, 684 F.2d 62, 70 n.6 (D.C. Cir. 1982).

56. For a discussion of adverse impact, see *supra* note 12.

57. Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

employment opportunity.[58] In disparate impact cases, the court must determine whether the harmful impact of an "innocent" employer's practices on the plaintiff class justifies burdening that employer with what may be a costly remedial obligation.[59]

Each of the theories of liability corresponds to a recognized conception of equality.[60] The disparate treatment theory reflects the equal treatment conception of equality. The disparate impact theory fits well with what is known as the equal opportunity or equal achievement conception of equality.

The equal treatment conception of equality focuses on fairness to the individual and is commonly associated with a legal command of color-blindness. The goal is to secure fair competition in which no person is disadvantaged in the quest for employment benefits because of racially biased decisionmaking.[61]

In contrast, the equal opportunity or equal achievement con-

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58. Connecticut v. Teal, 457 U.S. 440, 447 (1982); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

59. Successful plaintiffs in disparate impact cases are generally entitled to backpay under § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g). *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 413–25 (1975) ("given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination," *id.* at 421). Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), also provides that "the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee . . . ." A prevailing plaintiff in a Title VII action ordinarily recovers attorney's fees unless special circumstances would make the award unjust. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). However, compensatory or punitive damages generally are not allowed. *See, e.g.*, Shah v. Mt. Zion Hosp. & Medical Center, 642 F.2d 268, 272 (9th Cir. 1981); Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 654 (5th Cir. 1980), *cert. denied*, 449 U.S. 891 (1980); De Grace v. Rumsfeld, 614 F.2d 796, 808 (1st Cir. 1980).

60. *See, e.g.*, Belton, *supra* note 10, at 538–42; Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237–49 (1971). Throughout this Article, references to the dual *conceptions* of equality embodied in Title VII are meant to be distinguished from references to an overall, unitary *goal* or *concept* of equality vindicated by Act. The distinction between concept and conception is borrowed from R. DWORKIN, TAKING RIGHTS SERIOUSLY 134–35 (1977), which gives the following helpful example:

> Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind.

61. Belton, *supra* note 10, at 540; Fiss, *supra* note 60, at 237.

ception of equality is a group-oriented conception that seeks to upgrade the status and condition of protected groups by eliminating all unnecessary barriers to group advancement. Color-consciousness rather than color-blindness is often required to discover and eliminate obstacles to group advancement. Moreover, unlike the equal treatment conception, the group-oriented equal opportunity conception, as it is typically advanced, rests on the supposition that minority groups in society will continue to suffer disadvantages as a legacy of past discrimination, unless and until racial stratification disappears.[62] Despite these differences, both conceptions of equality are consistent with an ultimate ideal of equality in which race plays no significant role in decisionmaking, either overtly or as a reflection of a stratified society.

It follows from the distinct nature of the disparate impact theory that such claims are natural candidates for class actions.[63] Although also invokable by individual plaintiffs,[64] disparate impact theory, by definition, makes sense only in cases alleging discrimination against a group. It is impossible for an individual minority worker to establish adverse impact without some evidence of the effect of the selection device on persons other than the individual plaintiff.[65] Disparate treatment claims also may be raised by both individual plaintiffs and in class actions. But the gravamen of the disparate treatment action—intentional unequal treatment—may occur in either an isolated or systematic fashion.[66] The plaintiff, therefore, need not provide evidence of the effect of the employer's action on the group.

The leading disparate treatment case, *McDonnell Douglas Corp. v. Green*,[67] allocated the burdens of proof between the parties in a manner that aided the plaintiff, yet did not erase the requirement of proof of intentional discrimination. *McDonnell Douglas* established a three-part test that requires plaintiff to show prima facie (1) protected group status; (2) adverse treatment by the employer; and (3) minimal qualifications for the job at issue.[68] In the hiring context of *McDonnell Douglas*, a presumption

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62. Belton, *supra* note 10, at 541; Fiss, *supra* note 60, at 237–38.

63. Even Title VII plaintiffs alleging classwide discrimination, however, must satisfy the requirements of FED. R. CIV. P. 23. General Tel. Co. v. Falcon, 457 U.S. 147 (1982) (disapproving the Fifth Circuit's "across-the-board" rule for Title VII class actions that had treated racial discrimination, by definition, as class discrimination).

64. *See, e.g.*, Mitchell v. Board of Trustees, 599 F.2d 582, 584–85 (4th Cir. 1979); Spurlock v. United Airlines, Inc., 475 F.2d 216, 218 (10th Cir. 1973); Wade v. New York Tel. Co., 500 F. Supp. 1170, 1179 (S.D.N.Y. 1980).

65. Connecticut v. Teal, 457 U.S. 440, 458 (1982) (Powell, J., dissenting).

66. D. BALDUS & J. COLE, *supra* note 12, at § 1.22.

67. 411 U.S. 792 (1973).

68. "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimina-

of intentional discrimination arises if plaintiff is black and qualified, yet the employer did not hire plaintiff for an admitted vacancy.[69] At this juncture, the employer must articulate a nondiscriminatory reason for its action. This is the first point at which discriminatory intent is directly addressed.[70] Finally, even if the employer meets its burden, plaintiff still may prevail by proving that the employer's proffered reason was simply a pretext for intentional discrimination.[71]

The major disparate impact cases[72] also provide a three-stage procedure for the parties in litigation, but there the similarity to the substance of disparate treatment cases ends. First, plaintiff is required to demonstrate that defendant's practice or policy has a group adverse impact.[73] Once a plaintiff shows group harm, the

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> tion. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

In later cases, the Supreme Court explained why the above four elements were sufficient to create a prima facie case of intentional discrimination:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). *See also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253–54 (1981).

69. *McDonnell Douglas Corp.*, 411 U.S. at 802.

70. *Texas Dep't of Community Affairs*, 450 U.S. at 254–56; *McDonnell Douglas Corp.*, 411 U.S. at 802.

71. *Texas Dep't of Community Affairs*, 450 U.S. at 256; *McDonnell Douglas Corp.*, 411 U.S. at 804–05. The term "pretext" in the disparate treatment line of cases is used in its ordinary sense to signify an excuse masking a real, intentionally discriminatory reason.

In a disparate treatment case, the plaintiff retains the burden of persuasion on the crucial issue of discriminatory intent. *Texas Dep't of Community Affairs*, 450 U.S. at 256. Defendant's burden at the second stage of the disparate treatment case is merely to rebut the presumption of discrimination raised by plaintiff's prima facie showing by producing evidence that plaintiff was rejected for a legitimate, nondiscriminatory reason. *Texas Dep't of Community Affairs*, 450 U.S. 248, 256 (1981).

72. Connecticut v. Teal, 457 U.S. at 446–47 (1982); New York City Transit Auth. v. Beazer, 440 U.S. 568, 584–87 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

73. Statistics that reflect the effect of the practice on the protected group, rather than the testimony of affected individuals, constitute the most probative evidence of discrimination at this stage. D. BALDUS & J. COLE, *supra* note 12, at § 1.231 ("Under

employer may defend by establishing that the disputed practice or policy is a "business necessity."[74] For example, in the context of a challenge to a pre-employment test, business necessity is most often established by evidence that the test is an adequate predictor of an applicant's likely performance on the job.[75] By thus attempting to "validate" their tests as reliable predictors, employers argue that use of such tests is justified solely by the demands of the business.

Finally, even if an employer comes forward with sufficient evidence of business necessity, the courts agree that plaintiff must

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a disparate impact theory, statistical evidence of impact is not merely circumstantial (as it is under the disparate treatment theory), but is direct evidence of the results which trigger the demand for additional justification"); 2 A. LARSON & L. LARSON, *supra* note 19, § 50.21, at 10-7. For a discussion of the methods of proving adverse impact, see *supra* note 12.

74. In Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977), the Court defined "business necessity" as an employment practice that is "shown to be necessary to safe and efficient job performance." The *Dothard* formulation of "business necessity" closely resembled the formulation of that defense as first enunciated in Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). *See also* Williams v. Colorado Springs, Colo., School Dist., 641 F.2d 835, 841 (10th Cir. 1981); Swint v. Pullman-Standard, 624 F.2d 525, 535–36 (5th Cir. 1980), *rev'd*, 456 U.S. 273 (1982).

Several recent lower court decisions have, however, refused to apply this stringent formulation of the business necessity standard. *See, e.g.*, Contreras v. City of Los Angeles, 656 F.2d 1267, 1280 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (employer need only show that practices "significantly serve, but are neither required by, nor necessary to, the employer's legitimate business interests"); Chrisner v. Complete Auto Transit, 25 F.E.P 484, 491 (6th Cir. 1981) (less justification needed when job requires a high degree of skill and safety risks are present).

Lower courts are also in conflict over whether the defendant in a disparate impact case should shoulder both the burden of production and the burden of persuasion on the issue of justification for a challenged practice that adversely affects minorities. *Compare* Johnson v. Uncle Ben's, Inc., 657 F.2d 750, 753 (5th Cir. 1981), *cert. denied*, 103 S. Ct. 293 (1982) (once plaintiff proves its prima facie case, both the burden of production and the burden of persuasion shift to defendant) and Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Cir. 1980), *with* Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (en banc) (plaintiff retains burden of persuasion, defendant's burden is solely one of production). *See* Comment, *Texas Department of Community Affairs v. Burdine: The Procedural Subversion of Griggs v. Duke Power Co.?*, 17 NEW ENG. L. REV. 999 (1982).

75. *Teal*, 457 U.S. at 446–47; *Davis*, 426 U.S. at 247; *Albemarle Paper Co.*, 422 U.S. at 431; Griggs v. Duke Power Co., 401 U.S. 424, 433–36 (1971).

Some courts have stated that even validated tests or selection devices may be vulnerable under Title VII if there exists a feasible alternative with less discriminatory impact. *E.g.*, Blake v. City of Los Angeles, 595 F.2d 1367, 1383 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); Crockett v. Green, 388 F. Supp. 912, 920–21 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976). *See generally* Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376, 418–19 (1981). *Cf.* Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 101–02 (1974) (practice should be deemed justified if it furthers a valid business purpose and no alternative practice with lesser disparate impact would be as effective).

be given an opportunity to rebut.[76] The essential elements of plaintiff's rebuttal have, however, not been settled by the courts. One logical option is to allow the plaintiff to rebut by showing that the defendant may use an alternative device that has less adverse impact on the group.[77] The logic of this less restrictive alternative approach is that a case of genuine necessity is not made out if the existence of a reasonable option allows the employer to achieve its goals with less harm to those protected by Title VII.[78]

Recent Supreme Court decisions, however, seem to reject such a wide-ranging search for a less restrictive or less burdensome alternative. The Court has indicated that the plaintiff's rebuttal should instead focus on whether the employer is using the concededly job-related device as a pretext for intentional discrimination.[79]

The Supreme Court's apparent willingness to allow the employer's intent to become determinative at the surrebuttal stage of the disparate impact case has led to speculation[80] that the Court is

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76. *Albemarle Paper Co.*, 422 U.S. at 436.

77. Several lower courts have been reluctant to limit the scope of the plaintiff's rebuttal in impact cases solely to the question of defendant's discriminatory intent. These courts would permit plaintiff to rebut the business necessity defense upon proof of an alternative, nondiscriminatory practice which would accomplish the employer's stated objectives. *See, e.g.*, Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 989 n.5 (5th Cir. 1982); NAACP v. Medical Center, 657 F.2d 1332, 1336 n.17 (3d Cir. 1981); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 (6th Cir. 1981); Contreras v. City of Los Angeles, 25 FEP 866, 877–78 (9th Cir. 1981).

78. "It should go without saying that a practice is hardly 'necessary' if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory." Robinson v. Lorillard Corp., 444 F.2d 791, 798 n.7 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

79. *Teal*, 457 U.S. at 447; *New York Transit Authority*, 440 U.S. at 587; *Albemarle Paper Co.*, 422 U.S. at 425. In *Albemarle*, the Court put quotations around the word "pretext," thus implying that the term may not have the same ordinary meaning found in disparate treatment cases, i.e., discriminatory intent. *See* C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 12, § 1.5, at 59–60. In *Beazer*, however, the quotations disappeared and the term was apparently used in a manner more closely associated with actual discriminatory intent. "The District Court's express finding that the [employer's] rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination." 440 U.S. at 587.

For a more thorough analysis of the Supreme Court's treatment of the surrebuttal phase of disparate impact litigation, see Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. REV. 419, 423–25 (1982); C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 12, § 1.5, at 58–60; Booth & Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L.J. 121, 189 n.268 (1980); Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 Ga. L. Rev. 376, 418–19 (1981).

See also supra note 77 and cases cited therein (discussing lower court's reluctance to limit the scope of plaintiff's rebuttal to discriminatory intent).

80. Furnish, *supra* note 79, at 419.

subtly merging the disparate impact and intent theories. The merger conceivably could be accomplished by regarding a prima facie showing of disparate impact as functioning solely to create a presumption of intentional discrimination.[81] Such a merged theory would treat the evil to be remedied in both disparate impact and disparate treatment cases as the elimination of intentional discrimination and would handily explain why a showing of "pretext" by the plaintiff is necessary to overcome the employer's showing of job-relatedness or business necessity.

The case law, however, has never explicitly regarded proof of adverse impact as a mere proxy for intentional discrimination in disparate impact cases.[82] Rather, the opinions[83] suggest that a showing of adverse impact performs a distinctly different function in disparate treatment and disparate impact cases. For example, while a certain level of statistical proof of adverse impact in a disparate impact challenge may well satisfy plaintiff's burden of proving a prima facie case of unintentional discrimination, the same showing may not be strong enough to raise an inference of

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81. *Id.* at 443.

82. But compare Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224, 264–65 (N.D. Tex. 1980), in which Judge Patrick Higginbotham espoused the view that disparate impact analysis should be regarded simply as an application of equal treatment philosophy. It is unclear, however, whether Higginbotham's expanded equal treatment concept encompasses some forms of unintentional unequal treatment.

83. Since Griggs v. Duke Power Co., 401 U.S. 424 (1971), the courts have routinely insisted that discriminatory intent is not a critical ingredient of a disparate impact claim. *See* cases cited *supra* note 55. This insistence indicates that a showing of group adverse impact in disparate impact analysis functions as direct proof of the evil to be remedied rather than as a proxy for intentional discrimination. The U.S. Commission on Civil Rights has described the differing function of statistics in disparate treatment and disparate impact cases in this way:

> Although both the "intent" and the "effects" standards use statistical data in determining whether illegal discrimination has occurred, such data serve distinctly different purposes. In "intent" cases, the courts have had to develop a variety of ways to determine whether intentional discrimination exists, because few decisionmakers publicize or otherwise expose their discriminatory intent. Primary among these is numerical evidence of unequal results because "[i]n many cases the only available avenue of proof is the use of . . . statistics to uncover clandestine and covert discrimination." Other factors that may indicate such discriminatory intent include the sequence of events leading to the decision, abnormal procedures, the historical background of the decision, and contemporary statements by decisionmakers.
>
> In "effects" cases, however, numerical evidence is not used to assess the likelihood that the accused discriminator has intentionally caused harm to the victim on the basis of race, national origin, or sex because the intent of the discriminator is not determinative. In these cases, numerical evidence emphasizes the existing unequal conditions in our society, whether they are caused by one discriminator or many, intentionally or not.

U.S. COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980S: DISMANTLING THE PROCESS OF DISCRIMINATION 16–17 (1981) (citations omitted).

intentional discrimination in a class-wide disparate treatment setting.[84]

The differing role that proof of adverse impact plays under each theory is well illustrated by the landmark case of *Washington v. Davis*.[85] In that case, the Supreme Court rejected both a constitutional and a statutory challenge to the use of hiring tests by the District of Columbia's police department. With respect to the constitutional claim, the Court held that proof of discriminatory purpose was essential and found plaintiff's showing of adverse impact insufficient to raise an inference of intentional discrimination.[86] The statistical showing of adverse impact was enough, however, to raise a prima facie inference of discrimination under the statutory claim.[87]

Washington v. Davis suggests that the Court does not look upon disparate impact analysis as a heavyhanded evidentiary device designed to ferret out intentional discrimination, but as a tool for eliminating harmful, unjustified unintentional discrimination.[88] Given the Court's continued adherence to the distinctiveness of the two theories of liability under Title VII, its narrowing of the final stage of the impact case is best viewed as a device to allow the challenger to prove intentional discrimination, should the employer justify the alleged adverse impact to the Court's sat-

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84. Rivera v. City of Wichita Falls, 665 F.2d 531, 535 n.5 (5th Cir. 1982) ("lesser degree of statistical disparity adequate to support a disparate impact action"); Williams v. City of New Orleans, 543 F. Supp. 662, 672 (E.D. La. 1982) (In a disparate treatment case, the plaintiff can establish a prima facie case "by showing a longstanding and gross statistical disparity," while in a disparate impact case the plaintiff "need only show . . . a significantly adverse statistical impact on their protected class."). *See generally* C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 12, § 1.4(c), at 22–29.

85. 426 U.S. 229 (1976).

86. *Id.* at 246–47.

87. The statutory claim was grounded on alleged violations of civil service regulations and treated by the Court as "similar to those [standards] obtaining under Title VII." *Id.* at 249. Plaintiffs showed that blacks failed the challenged test four times as often as whites. *Id.* at 237. Although this showing was sufficient to require justification under disparate impact analysis, *id.* at 249–50, the Court held that the adverse impact was justified, *i.e.*, that the test was sufficiently job-related to pass the "more probing judicial review" appropriate for statutory claims. *Id.* at 247.

88. Although a showing of discriminatory intent is essential to finding an equal protection violation in a suit against a public employer, see *infra* note 102, this requirement ought not to influence the determination of the nature of the right protected by Title VII disparate impact theory. Congress is empowered under the Commerce Clause, and perhaps Section 5 of the 14th amendment as well, to prohibit public employers from using unjustified neutral policies or practices that have a discriminatory effect. *Cf.* EEOC v. Wyoming, 51 U.S.L.W. 4219 (Mar. 2, 1983) (extension of Age Discrimination in Employment Act to cover state and local governments is a valid exercise of Congress' Commerce Clause power); *see generally* Jacobs, *A Constitutional Route to Discriminatory Impact Statutory Liability for State and Local Government Employers: All Roads Lead to Rome*, 41 OHIO ST. L.J. 301 (1980).

isfaction.[89] Under this view, the pretext phase of the impact case functions only to insure against the relatively rare case of employers attempting to use theoretically "necessary" practices to accomplish intentionally discriminatory objectives. Thus, the Court's refusal to endorse a more wide-ranging search for alternatives may be explained satisfactorily without deviating radically from the traditional view of the distinctiveness of the two theories.

B. *Legislative Bases for the Dual Theory Approach*

Although the Supreme Court opinions continue to endorse both the disparate treatment and impact methods for proving discrimination under Title VII, they have not yet yielded a full explanation of how the differing approaches together contribute to the equality objectives underlying Title VII. Most significantly, the Court has not elaborated on why intent is the cornerstone of the disparate treatment case,[90] yet unnecessary to a finding of discrimination under disparate impact theory.[91] The coexistence of the two theories, absent a recognized justification for the differences, may mean either that the theories are separately designed to implement two differing conceptions of equality or that the theories are simply distinct methods for enforcing a single conception of equality. A fully satisfactory answer does not readily emerge from either the statutory language or the legislative history surrounding Title VII. These sources do, however, tend to support two distinct conceptions of equality which may be paired with the two theories of liability.[92]

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89. The Fourth Circuit has recently adopted this view of the surrebuttal stage of the impact case:

> The Supreme Court's recognition in *Albemarle Paper* and *Beazer* that following *prima facie* proof and *prima facie* avoidance of a disparate impact claim, a claimant can yet prove discriminatory treatment by showing "pretext" in the challenged practice simply reaffirms the Court's consistent admonition that both theories may appropriately be applied as alternative bases of recovery on the same set of facts.

Wright v. Olin Corp., 697 F.2d 1172, 1192 n.31 (4th Cir. 1982). *See also* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1354 n.22 (3d Cir. 1981) (Gibbons, J., dissenting):

> [*Albermarle*] can be read as simply acknowledging that plaintiffs who failed to prove a *Griggs*-type violation, could nonetheless still attempt to succeed on an intent theory if they were prepared to prove that less discriminatory alternatives existed and that, therefore, defendant's justification was merely pretextual, 422 U.S. at 425, 95 S. Ct. at 2375. This use of alternatives as circumstantial evidence of discriminatory animus is standard in intentional discrimination cases.

90. For a discussion of the importance of the employer's intent in disparate treatment cases, see *infra* text accompanying notes 114–42.

91. For a discussion of why a finding of discriminatory intent is unnecessary in disparate impact cases, see *infra* text accompanying notes 143–93.

92. For a discussion of the two conceptions of equality, see *supra* text accompanying notes 60–62.

The language of Title VII itself broadly prohibits discrimination without attempting to define the concept in precise terms. The basic provisions, Sections 703(a)(1) and (2),[93] make it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, or as an applicant for employment, because of such individual's race, color, religion, sex or national origin.[94]

On its face, the language is capable of supporting both disparate treatment and disparate impact theories.[95] The critical statutory phrase "because of," delimiting the kinds of discrimination that are actionable, is ambiguous. Although the phrase might be thought to connote intentionality, the language denotes only a causal relationship between an enumerated characteristic and the challenged action.[96] A faithful reading of the language, then, could encompass wholly unintentional adverse treatment in which

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93. 42 U.S.C. § 2000e-2(a)(1), (2) (1976). The only change made by the 1972 amendments to this section was the inclusion of the phrase "or applicants for employment" in Section 703(a)(2). Pub. L. No. 92-261, 86 Stat. 107 (1972).

94. 42 U.S.C. § 2000e-2(a)(1), (2) (1976).

95. At first glance, the references in Sections 703(a)(1) and (2) to "any individual" might suggest that the focus should be on individual rather than group harm and thus seem more compatible with a claim of disparate treatment than one of disparate impact. But it is also reasonable to interpret the language as forbidding certain disadvantageous effects on protected groups, at least insofar as such harm ultimately descends upon individuals. *Cf. Teal*, 457 U.S. at 458-59 (Powell, dissenting); *Furnco Constr. Corp.*, 438 U.S. at 581-82 (Marshall, J., concurring in part and dissenting in part) (for the argument that individual rights are protected under Section 703(a)(2) by permitting an individual plaintiff to prevail upon a showing that a policy operates simultaneously as a barrier to the plaintiff's own advancement and as a barrier to the advancement of the minority group of which plaintiff is a member). A similar argument tying individual interests to the use of disparate impact theory may be made under Section 703(a)(1).

96. Even when the precise term "intent" is used in the Act, the courts have not given it a uniform meaning. Thus, Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), empowering the court to grant injunctive and affirmative relief if it finds the employer has "intentionally engaged in or is intentionally engaging in an unlawful employment practice," has been construed to require only that the employer's action not be accidental. It thus does not require proof of discriminatory intent. *E.g.*, Williams v. General Foods Corp., 492 F.2d 399, 406 (7th Cir. 1974); United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971).

In contrast, the Court has construed the proviso insulating bona fide seniority and merit systems that "are not the result of an intention to discriminate" in Section 703(h), 42 U.S.C. § 2000e-2(h), as requiring a finding of discriminatory intent. American Tobacco Co. v. Patterson, 456 U.S. 63, 69-70 (1982) (post-Act seniority system);

race or sex plays a role.[97]

More straightforward support for a disparate impact theory focusing on the status or condition of the group can be found in Section 703(a)(2). This section prohibits actions that "in any way deprive or tend to deprive any individual of employment opportunities" or "otherwise adversely affect his status as an employee or as an applicant for employment." This language potentially encompasses practices that are not animated by an intent to deprive and paves the way for use of disparate impact analysis in which proof of group adverse impact supplies the causal tie to race.[98]

The ambiguity of the language of Title VII, compatible as it is with two conceptions of equality and two theories of liability, is only compounded by the equally ambiguous legislative history surrounding Title VII.[99] Like the statutory language, the legisla-

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International Bhd. of Teamsters v. United States, 431 U.S. 324, 353-54 (1977) (pre-Act seniority system).

97. E.g., it would not stretch the familiar meaning of "because of" to conclude that an applicant for employment was deprived of a job opportunity "because of" race if past educational deficiencies resulting from racial discrimination prevented the applicant from achieving a passing score on an employment test, whether or not the test itself was job-related or neutrally motivated.

98. Justice Powell described the causal link in disparate impact cases in his dissent in *Teal*:

> In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference*—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of that disproportionately excluded group, was himself a victim of that process' "built-in head winds."

Teal, 457 U.S. at 458–59 (1982) (Powell, J., dissenting). Similar views have been expressed by commentators:

> The inference of discrimination that arises from a showing of group adverse impact may only be "rebutted," however, by a showing that the discriminatory policy is justified by business necessity. Because the state of defendant's mind is not a critical factor under disparate impact theory, causation is generally not a critical issue in such cases, except insofar as causal inquiries are necessary to determine whether the challenged policy is indeed causing the observed disparate impact.

D. BALDUS & J. COLE, *supra* note 12, at 45.

99. Title VII is only one part of the Civil Rights Act of 1964, a comprehensive civil rights enactment. The other components of the Act are: Title I, Voting Rights, 42 U.S.C. § 1971 (1976); Title II, Public Accommodations, 42 U.S.C. §§ 2000a to a-6 (1976); Title III, Public Facilities, 42 U.S.C. §§ 2000b to b-3 (1976); Title IV, Public Education, 42 U.S.C. §§ 2000c to c-9 (1976 & Supp. V 1981); Title V, Civil Rights Commission, 42 U.S.C. § 1975a-d (1976 & Supp. V 1981); Title VI, Federally Assisted Programs, 42 U.S.C. §§ 2000d to d-4 (1976 & Supp. V 1981); Title VIII, Voting Statistics, 42 U.S.C. § 2000f (1976).

The political heat surrounding the Civil Rights Act of 1964 resulted in an unusual legislative procedure. Since the bill went directly to the Senate floor from the House, there is no Senate Committee Report. The report of the House Judiciary Committee deals with a bill that differs somewhat from the final legislation. The most significant changes made by the Senate related to enforcement powers of the EEOC.

tive history of the 1964 Act can reasonably be interpreted to support both theories of liability and corresponding conceptions of equality.

Uppermost in the mind of Congress was the classic disparate treatment case.[100] Repeated references to the establishment of a "legislative civil right"[101] embodying the guarantees of the constitutional right to equal protection[102] clearly indicate that Congress was concerned with elimination of intentional discrimination in the paradigm disparate treatment context.[103]

The legislative history, however, also contains much implicit support for a disparate impact approach. The detailed House Ju-

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110 CONG. REC. 12,721-25 (1964), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3003 (comments of Senator Humphrey). The coverage and substantive prohibitions of the Act, however, remained basically unchanged. For more thorough descriptions of the procedural legislative background culminating in Title VII, see EEOC LEGISLATIVE HISTORY, *supra* note 5, at 7–11, and Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 443–47 (1966).

100. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citing 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey)). *See also* Senator Clark's definition of discrimination:

> Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act and the Fair Labor Standards Act, for even a longer period. To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex or national origin); any other criteria or qualification is untouched by this bill.

110 CONG. REC. 7218 (1964), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3015 (In response to a memorandum propounding questions by Senator Dirksen (R., Ill.)). Clark, a floor manager of the bill, emphasized that "[n]othing in the bill will interfere with merit hiring, or merit promotion. The bill simply eliminates consideration of color from the decision to hire or promote." *Id.*

101. 110 CONG. REC. 13,080 (1964), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3092 (remarks of Sen. Clark); 110 CONG. REC. 8921 (1964), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3190 (remarks of Sen. Williams).

102. The Supreme Court has held that claims of both race and sex discrimination under the fourteenth amendment equal protection clause require proof of a discriminatory motive before the courts may apply heightened scrutiny. Washington v. Davis, 426 U.S. 229, 242 (1976) (race); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 271–74 (1979) (sex). These cases were, of course, decided over a decade after Title VII was enacted. It is by no means certain that in 1964 Congress conceived of the equal protection right solely as a protection against purposeful discrimination. *Cf.* Jacobs, *supra* note 88, at 316–17 (by 1972, "Congress' understanding of what discrimination was proscribed by the equal protection clause rested on the impact standard").

103. The proponents of the Act also sought to discredit claims of opponents that Title VII would introduce mandatory quota hiring by professing that "the color of a man's skin . . . should be [a] completely extraneous consideration . . . when an employer hires . . . ." 110 CONG. REC. 9881 (1964), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3187 (comments of Sen. Allott (R., Colo.) in support of an anti-quota amendment similar to Section 703(j) of Title VII, 42 U.S.C. § 2000e-2j (1976)).

diciary Report[104] carefully documented the practical concerns that provided the impetus for the legislation—that is, the harsh effects of racial discrimination. The high black unemployment rate, the low median annual income of blacks, the high infant mortality rate of black children and correspondingly low life expectancy, were labeled as an "economic waste"[105] that not only deprived blacks of first class citizenship but also hampered the national prosperity.[106] The Committee believed that it was possible to eliminate these inequities: "All that is needed is the institution of proper training programs and the elimination of discrimination in employment practices."[107]

There was thus an expectation, by the Committee at least, that the end of discrimination as that concept was embodied in Title VII would bring about profound economic and social changes. The EEOC was charged with the duty to usher in this new era, and it is reasonable to suppose that Congress contemplated some evolution regarding the types of practices to be considered discriminatory as the agency progressed in its monumental task.[108] Specifically, inasmuch as Congress expressed the impetus for Title VII in terms of the economic harm

104. H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 2001–2176.

105. H.R. REP. NO. 914, PART 2, 88th Cong., 1st Sess. 27–28 (1963), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 2148–49.

106. For example, in 1962, the unemployment rate for whites was 4.9%; for nonwhites, 11.0%. In 1960, the median income of nonwhite males was 59.9% that of white males. The median income of nonwhite females was 50.3% that of white females. *Id.*

The legislative history of the 1964 Act does not, however, evidence a comparable concern for the economic condition of women. The addition of sex as a prohibited category of discrimination was a result of a floor amendment by Southern congressmen who hoped thereby to defeat the legislation. Congressman Smith (D., Va.) introduced the amendment by reading a letter from a constituent who expressed a desire that an amendment adding sex would guarantee the "right" of every woman to a husband, a "right" that was in jeopardy because of the "imbalance" created by 2,661,000 more females than males in the country. 110 CONG. REC. 2577 (1964), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3213–14. The amendment was taken seriously by some members of Congress, however, and was passed in the House by a vote of 168 to 133. 110 CONG. REC. 2577–84 (1964), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3218-28 (remarks by Congresswomen Griffiths, Bolton, St. George, and Green). By 1971, there was no question that the Congress intended to fully protect women's rights. *See* HOUSE COMM. ON EDUC. & LABOR, EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971, H.R. REP. NO. 238, 92d Cong., 1st Sess. 3–5 (1971); SENATE COMM. ON LABOR & PUBLIC WELFARE, EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971, S. REP. NO. 415, 92d Cong., 1st Sess. 7–8 (1971).

107. H.R. REP. NO. 914, PART II, 88th Cong., 1st Sess. 28 (1963), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 2149.

108. *See* Belton, *supra* note 10, at 539–42; Blumrosen, *Affirmative Action*, *supra* note 19, at 12–14; Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1614 (1969).

sustained by protected groups because of discrimination, the EEOC would be justified in identifying discrimination by measuring the adverse impact of employment practices on protected groups.[109]

Finally, the legislative history of the 1972 amendments to Title VII eliminated any significance that courts could have attached to the ambiguity of the 1964 legislative history regarding Congress' anticipation of a group-oriented approach to Title VII compliance. By 1971, Congress was fully aware that the discrimination subject to agency and court action encompassed far more than intentional action against individuals. The Report of the House Committee on Education and Labor[110] described the contemporary understanding of employment discrimination as a "complex and pervasive phenomenon"[111] that involved systematic as well as individual harms. The Report also explicitly recognized that widespread unintentional discrimination remained a critical problem "whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful."[112] Thus, the legislative history indicates that although Congress may not have explicitly sanctioned disparate impact theory in 1964, it later was willing to accept an operational definition of "discrimination" that incorporated disparate impact analysis.[113] As was true in the

109. Understandably, however, the Judiciary Committee was not willing to achieve these largely economic goals at any cost. Rather, the Committee admonished the EEOC to leave "management prerogatives, and union freedoms . . . undisturbed to the greatest extent possible." H.R. REP. NO. 914, PART II, 88th Cong., 1st Sess. 29 (1963), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 2150.

110. H.R. REP. NO. 238, 92d Cong., 1st Sess. 8 (1971). For a more thorough examination of the legislative history of the 1972 amendments to Title VII, see Jacobs, *supra* note 88, at 313–21.

The Court has waivered on the propriety of using the legislative history of the 1972 amendments to interpret the provisions of the 1964 Act. Thus, in International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977), the Supreme Court stated that the legislative history of the 1972 amendments should not be used to interpret Section 703(h), an original provision of the 1964 Act. In Connecticut v. Teal, 457 U.S. 440 (1982), however, the Court supported its analysis of the meaning of *Griggs* and Section 703(a)(2) by reference to the legislative history of the 1972 amendments. *Id.* at 447 n.8. The majority reasoned that the 1972 legislative history was relevant in *Teal* because the 1972 amendments extended the protection of the Act to public employers, like the defendant in *Teal*. *Id.* There is nothing in the majority opinion, however, to suggest that the *Teal* analysis should not be equally applicable to private employers. Rather, the Court stated that Congress intended to accord the same protection to employees in both the public and private sectors. *Id.* at 449.

111. H.R. REP. NO. 238, 92d Cong., 1st Sess. 8 (1971).

112. *Id.*

113. The House also cited Griggs v. Duke Power Co., 401 U.S. 424 (1971), with approval and thus explicitly recognized the Court's use of disparate impact analysis to enlarge the operative definition of discrimination. H.R. REP. NO. 238, 92d Cong., 1st Sess. 8 (1971).

eight years preceding the 1972 legislative reappraisal, the courts and the EEOC were to have the major responsibility for guiding the evolution of the theories and thus the extent of actionable discrimination.

C. *Disparate Treatment Cases: The Role of Intent*

Probably the more familiar of the two theories of liability is the disparate treatment theory,[114] which often focuses on race-based harms to particular individuals.[115] The theory's resemblance to the equality guarantee of the equal protection clause of the fourteenth amendment makes it an easily accepted method for eliminating the most recognizable forms of discrimination. As required by the constitutional standard for equal protection claims,[116] proof of defendant's discriminatory intent is a prerequisite to liability in disparate treatment cases. In constitutional litigation, the requirement of intent serves to limit the instances in which the courts may properly refuse to defer to legislative judgments.[117] Analogously, the requirement of intent in disparate treatment cases under Title VII functions as a restraint on judicial intrusion into employer decisionmaking.

McDonnell Douglas v. Green[118] established that in the individual case,[119] liability depends on whether the employer's action was "racially premised."[120] The Court characterized the shared societal interest in "efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions"[121] as sufficient to support a broad prohibition on racially biased decisionmaking. Proof of discriminatory motive thus

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114. *See supra* text accompanying notes 50–71.

115. *See generally* Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CALIF. L. REV. 1201 (1982).

116. *See* cases cited *supra* note 102.

117. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977). For a discussion of the role of motivation in constitutional analysis, see Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 115–18 (1971).

118. 411 U.S. 792 (1973).

119. Classwide claims of disparate treatment are also available under Title VII. *See generally* C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 12, § 1.4, at 16–33. As in the individual case, proof of discriminatory intent is critical in classwide claims. *International Bhd. of Teamsters*, 431 U.S. at 335 n.15. In a classwide claim, however, a strong showing of statistical proof of discrimination will often be enough to establish a prima facie case of discrimination. D. BALDUS & J. COLE, *supra* note 12, at § 1.221[1] (Supp. 1983). In individual cases of discrimination, there is less agreement in the caselaw regarding the sufficiency of statistics alone to establish a prima facie case of discrimination. *Id.* at § 1.222[1].

120. *McDonnell Douglas*, 411 U.S. at 805 n.18.

121. *Id.* at 801.

functioned as conclusive proof that the challenged action was unjustified; no showing of business necessity could override the plaintiff's proof of intentional discrimination.[122] Since *McDonnell Douglas*, the Court has not wavered on the necessity of proving intent in disparate treatment cases and has continued to hinge liability solely upon proof of this critical element.[123]

By insisting on proof of discriminatory intent, the Court has protected the employer's prerogative to make unwise or even irrational decisions that adversely affect individual minority members.[124] Private employers, unconstrained by the commands of the due process clause or other constitutional limitations, generally have no duty to act fairly or even rationally with respect to their employees.[125] Title VII's prohibition of disparate treatment, then, operates not as a refinement of an overall duty to act fairly,

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122. Under § 703(e) of Title VII, 42 U.S.C. § 2000e-2(e)(1) (1981), the defense of a bona fide occupational qualification (BFOQ) may be invoked to justify explicit discrimination based on religion, sex or national origin. There is no BFOQ defense available, however, for discrimination based on race or color. In non-race cases, it is unlikely that the courts will sustain an "eleventh hour" claim of a BFOQ in a covert, intentional discrimination case. *Cf.* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982) (examining cases involving employer decisions premised on unlawful motivation that could be justified by lawful considerations).

123. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252–53 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) (per curiam); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579–80 (1978).

124. The only constraint on the employer is that the unwise action not be a pretext for intentional disparate treatment. *See, e.g.*, St. Peter v. Secretary of Army, 659 F.2d 1133, 1139 (D.C. Cir. 1981) (Mikva, J., concurring) ("Employers usually act in their own best interests, and it is somewhat incongruous to find that the employer chose a less-qualified man, rather than a more-qualified woman, but did not do so for discriminatory reasons. Although it may be difficult to convince a trier of fact that an employer selected a less-qualified person for a nondiscriminatory reason, such behavior is not actionable."); Garcia v. Gloor, 609 F.2d 156, 162 (5th Cir. 1980) (Title VII "does not prohibit all arbitrary employment practices. It does not forbid an employer to hire only persons born under a certain sign of the Zodiac or persons having long or short hair or no hair at all."); Washington v. Kroger, 671 F.2d 1072, 1077 (8th Cir. 1981); Miller v. WFLI Radio Inc., 51 U.S.L.W. 2510–52 (6th Cir. Sept. 14, 1982); Osborne v. Cleland, 620 F.2d 195, 199 n.5 (1980); Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 262 n.36 (1980). But see Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L.J. 519 (1980), for the pre-*Burdine* view that, in its operation, Title VII protects all workers from arbitrary treatment.

125. One exception, however, to the traditional common law rule that employment contracts are terminable at will is an emerging doctrine that restricts employers' prerogatives in discharging an employee. Under this doctrine, an employer is not free to discharge when the motivation is deemed contrary to a strong public policy, such as the policy against discrimination in employment. *See, e.g.*, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (sexual harassment). The abusive discharge doctrine has not yet gained widespread acceptance, however, and there is still no general prohibition against discharge without "just cause." *See* Comment, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975); Annot., 14 A.L.R. 4th 544, 558–60 (1982).

but as a distinct constraint that interferes with an employer's otherwise undisturbed prerogative.

Despite its familiarity, the intent requirement in individual cases does not flow inescapably from either the language or legislative history of Title VII.[126] Just as a neutral, but unjustified, practice adversely affecting the group can be labeled as discriminatory under Title VII,[127] the statutory language is capable on its face of supporting an operative definition of discrimination that encompasses any unjustified employer action that harms an individual minority employee.[128] Thus an employer's isolated, but nevertheless unreasonable, decision to fire a black employee, even if not racially motivated, could conceivably contravene Title VII's explicit antidiscrimination mandate. Moreover, it is likely that an interpretation of Title VII outlawing any unjustified employer action that adversely affects even one black employee would improve the employment status of blacks as a group.

However, if unjustified adverse impact on the individuals alone were actionable under Title VII, it would severely alter the employer's autonomous position with respect to routine decisionmaking and create a tremendous strain on judicial resources. Many employers who act in an evenhanded manner could expect their employment decisions at some point to become proper subjects for challenge. Over time, even the most facially innocuous personnel practices may operate to the disadvantage of a minority

126. *See supra* text accompanying notes 90–113 (discussion of language and legislative history of Title VII).

127. *See supra* text accompanying notes 72–89 and *infra* text accompanying notes 143–93 (discussion of the disparate impact theory).

128. Given the inferior economic and social position of blacks, it is possible to assume that identical employer action (*e.g.*, arbitrary dismissal) affecting both a black and a white employee tends to hurt the black worker more. The black worker is likely to have less job mobility and fewer substitute employment opportunities. Thus, the minority status of the individual black worker perhaps may be viewed as a "cause" of his greater harm, even absent proof of intentional disparate treatment or classwide adverse impact on blacks. In such cases, if the greater detriment arguably suffered by the individual black worker were to become the touchstone of liability, there would not appear to be any principled limit on the range of individual and social factors which the court should take into account in determining liability for individual injuries. The difficulties that would be posed by so unmanageable a theory of liability might well be thought to outweigh any incremental benefit gained by the eradication of an unintentional practice that harms only an individual minority worker.

Unquestionably, there is no justification for using Title VII to remedy unjustified employer action that harms only an individual white worker. Unless the employer's action is motivated by race, such action cannot possibly be the basis of a Title VII claim because the harm cannot plausibly be connected to race. Unlike action adversely affecting an individual minority worker, action adversely affecting a white worker does not reverberate in a society that generally disadvantages whites. Because whites are not a traditionally victimized group in our society, there is no reason to suppose that the race of the worker will likely aggravate the injury produced by the employer's action.

employee. The Title VII machinery[129] is not designed to accommodate the volume of litigation that would likely result from such a broad reading of the statutory language. Rather than reinforce Title VII's antidiscrimination mandate, such an expansive construction of the Act would transform the legislation from an antidiscrimination measure to a fair employment practices code, a result clearly not sanctioned by the scheme of the Act.[130]

Moreover, prohibiting unjustified adverse impact on individual members of a protected group could be perceived as unfair and would be hard to reconcile with any conception of equality implied in Title VII.[131] Although neither the language of Title VII nor the legislative history of the Act explicitly endorses a single, precise conception of equality,[132] two general features of Congress's attitude toward equality can be inferred with some assurance. First, at the heart of the protection afforded by the Act is the judgment that it is unfair to single out an individual for disadvantageous treatment simply because of race.[133] The Act thus imposes a kind of competitive equality in the work force by generally requiring an employer to make decisions on a color-blind basis.[134] The requirement of unbiased decisionmaking also assures that individuals will be treated as equals and reflects a moral sentiment that respect for individual dignity is fundamentally at odds with racist views.[135]

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129. Title VII requires that an individual who has a grievance first file a complaint with the EEOC. The EEOC is empowered to investigate the charges and to attempt to resolve claims by means of "conference, conciliation and persuasion where there exists "reasonable cause" to believe a violation has occurred." 42 U.S.C. § 2000e-5(b) (1981). If these informal methods fail, an action may be brought in federal court by either the individual complainant, the EEOC, or, in the case of public employer defendants, the Attorney General. For a detailed discussion of Title VII litigation procedure, see B. SCHLEI & P. GROSSMAN, *supra* note 12, at 769–1082.

130. For an example of a true fair employment practices code, see the Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.), which mandates merit-based employment practices.

131. *See supra* text accompanying notes 60–62

132. *See supra* text accompanying notes 90–113.

133. *See, e.g.*, 110 CONG. REC. 7218 (1964), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3107.

134. A major exception to the color-blindness requirement underlying disparate treatment theory is that accorded to valid affirmative action programs. United Steelworkers v. Weber, 443 U.S. 193 (1979), discussed *infra* text accompanying notes 247-254. Although Title VII protects whites as well as blacks from invidious disparate treatment, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), *Weber* insulates reasonable affirmative action programs from the Act's proscriptions. *See generally* Belton, *supra* note 10; Blumrosen, *Affirmative Action*, *supra* note 19, at 1; Boyd, *Affirmative Action in Employment—The* Weber *Decision*, 66 IOWA L. REV. 1 (1980).

135. *See* H.R. REP. NO. 914, at 30, *reprinted in* EEOC LEGISLATIVE HISTORY at 2151:

> Aside from the political and economic considerations, however, we believe in the creation of job equality because it is the right thing to do.

Second, both proponents and opponents of the Act[136] agreed that Title VII did not mandate a rigid kind of distributive equality in which the employment opportunities would be allocated without regard to merit and solely in proportion to the representation of protected groups in the general population. Quotas and preferences, at least in their most extreme and direct form, were considered antithetical to Title VII objectives.[137]

If a Title VII violation could be made out solely by proving unjustified adverse impact affecting an individual minority employee, the remedy in such a case would likely be regarded as a racial preference unsupported by the Act. When the only charge leveled against an employer is an unreasonable response in an isolated incident, it is very difficult to find a sufficient causal nexus between the unfair treatment and the employee's race.[138] Providing a remedy to a minority employee in such a case would afford the kind of race-conscious treatment that is justified only in response to a demonstration of entrenched, systematic group inequality.[139]

Thus, requiring proof of intent in individual Title VII cases performs two functions. First, the requirement reinforces the traditional view that competitive equality and respect for individual dignity can best be assured if employer actions based upon discriminatory motive are outlawed.[140] Second, the intent requirement also operates as a direction to the judiciary not to disturb employer choice unless there is some assurance that the interference is required to remove employment barriers that pose

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> We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is such that we refuse to treat him as if his rights and well-being are bargainable. All vestiges of inequality based solely on race must be removed in order to preserve our democratic society, to maintain our country's leadership, and to enhance mankind.

136. *See* Section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), *reprinted infra* note 285.

137. *E.g.*, in response to an objection posed by opponents of the bill that Title VII would "require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area," Senator Clark remarked that "[q]uotas are themselves discriminatory." 110 CONG. REC. 7218, *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3015. *See also* 110 CONG. REC. 9881–82 and 110 CONG. REC. 8921, *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3187–90 (legislative debate surrounding Section 703(j) of Title VII, 40 U.S.C. § 2000e-2(j)).

138. *See supra* note 128.

139. *See* Wright v. National Archives & Records Serv., 609 F.2d 702, 711–13 (4th Cir. 1979) (en banc) (absent proof of discriminatory intent, Title VII does not protect black plaintiff who demonstrated only that he, alone, experienced adverse impact from operation of defendant's training program); *accord* Pinckney v. County of Northampton, 512 F. Supp. 989, 996 (E.D. Pa. 1981).

140. *See supra* text accompanying notes 133–35.

an obstacle for the group as a whole, not simply for individual members. By thus forbidding displacement of management prerogative unless the consequences are sufficiently widespread, the intent requirement functions as a definitional balancing[141] of employee and employer interests: absent proof of intentional discrimination,[142] neutral practices will be examined and their fairness and efficiency judged only when there is systematic disadvantaging as evidenced by group adverse impact.

D. *Eliminating Unnecessary Barriers to Equality: Divorcing Intent From Liability in Disparate Impact Cases*

The group-centered disparate impact theory of Title VII liability reaches further in its effect on employers than the individual-centered disparate treatment theory. As the offspring of the cross-fertilization between the courts and the EEOC,[143] disparate

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141. For a discussion of definitional balancing in the first amendment context, see Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 939–48 (1968) (advocating definitional balancing rather than ad hoc balancing in free speech cases); Black, *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, in C. BLACK, THE OCCASIONS OF JUSTICE 89 (1963); A. BICKEL, THE LEAST DANGEROUS BRANCH 96 (1962).

142. Of course, simply requiring proof of discriminatory motive does not exhaust the inquiry in disparate treatment cases. Fashioning a workable definition of discriminatory motive and determining the allocation of burdens of proof of such motive are complex problems that have absorbed the Supreme Court as well as the lower tribunals. *See Burdine*, 450 U.S. 248 (1981), *vacating* 608 F.2d 563 (5th Cir. 1979); Board of Trustees v. Sweeney, 439 U.S. 24 (1978) (per curiam), *vacating* 569 F.2d 169 (1st Cir. 1978); *Furnco Construction Co.*, 438 U.S. 567 (1978), *reversing* 551 F.2d 1085 (7th Cir. 1977); *McDonnell Douglas Corp*, 411 U.S. 792 (1973), *vacating* 463 F.2d 563 (8th Cir. 1972). *See also* Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980); Jackson v. United States Steel Corp., 624 F.2d 436 (3d Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) (all treating allocation of the burden of proof); EEOC v. Radiator Specialty Co., 610 F.2d 178 (4th Cir. 1979) (refining plaintiff's prima facie burden of proof on qualifications); Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224 (N.D. Tex. 1980) (treating question of unavailability of data as related to plaintiff's prima facie burden); Pegues v. Mississippi State Employment Service, 22 E.P.D. ¶ 30,765 (N.D. Miss. 1980) (refining defendant's burden of producing evidence of good faith to rebut plaintiff's prima facie case). *See generally* D. BALDUS & J. COLE, *supra* note 12, at § 6.2 (Supp. 1981).

143. The EEOC is the principal agency charged with enforcing Title VII and providing leadership and coordination to efforts of the other federal agencies which enforce laws and policies requiring equal employment opportunity. 42 U.S.C. § 2000e-4–5 (1976 & Supp. V 1981); Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (1978). Other federal agencies that played a key role in developing the legal standards for test and other selection device validation were the Justice and Labor Departments and the Civil Service Commission. *See* Blumrosen, *The Bottom Line in Equal Employment Guidelines: Administering a Polycentric Problem*, 33 AD. L. REV. 323, 329–36 (1981) [hereinafter cited as Blumrosen, *The Bottom Line in Equal Employment Guidelines*]; Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 CATH. U.L. REV. 605, 607–10 (1979).

impact analysis has grown in spurts in response to concrete problems, rather than as a neatly packaged theory of liability.

The EEOC first applied a disparate impact analysis in connection with employment tests. The simple 1966 Guidelines on employment testing procedures[144] interpreted Section 703(h) of the Act,[145] dealing with professionally developed ability tests, as permitting the use of only job-related tests, regardless of the absence of discriminatory intent by the employer. Although a seemingly modest requirement, the implications of the early Gudelines were far-reaching. Abandoning the intent requirement meant not only an easing of proof problems for potential plaintiffs but an expansion of the conception of equality beyond equal treatment to include the notion of fair access to job opportunities for the group.

During the first five years immediately following passage of Title VII, lower courts applied an effects test to invalidate selection devices such as pre-employment tests[146] and other hiring qualifications,[147] hiring hall arrangements,[148] word of mouth

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144. The 1966 EEOC Guidelines provided:

> The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.

EEOC Guidelines on Employment Testing Procedures (Aug. 24, 1966), *reprinted in* Griggs v. Duke Power Co., 401 U.S. 424, 433 n.9 (1971).

145. Section 703(h) states in pertinent part:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h) (1976). The provision was added by floor amendment by Senator Tower because of a concern that job-related tests might be deemed invalid under Title VII. *See* Griggs v. Duke Power Co., 420 F.2d 1225, 1242–43 (4th Cir. 1970), *rev'd in part*, 401 U.S. 424 (1971). For a thorough discussion of legislative history surrounding Section 703(h), see *id.* at 1241–43 (Sobeloff, J., concurring in part and dissenting in part).

146. *See, e.g.*, United States v. Sheet Metal Workers Int'l Ass'n Local Union No. 36, 416 F.2d 123, 136 (8th Cir. 1969) (court struck down subjective grading system even though there was no direct evidence of intentional discrimination); Arrington v. Massachusetts Bay Transp. Auth., 306 F. Supp. 1355, 1358–59 (D. Mass. 1969) (test with disparate impact is discriminatory unless demonstrable evidence of correlation between test scores and job performance).

147. *See, e.g.*, Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1973) (refusal to hire frequently arrested persons).

148. *See, e.g.*, United States v. Sheet Metal Workers Int'l Ass'n Local Union No. 36, 416 F.2d 123, 129–32 (8th Cir. 1969).

recruiting,[149] and seniority and transfer systems.[150] Understandably, no single view of the effects theory of liability emerged. Other than agreeing that proof of post-Act discriminatory intent was not a necessary ingredient of every claim, the cases during this initial period differed both in theory and application.

There were two decisions involving seniority and transfer systems that perpetuated the effects of the employer's pre-Act intentional discrimination that proved to be highly influential. In both *Quarles v. Phillip Morris Inc.*[151] and *Local 189, United Papermakers & Paperworkers v. United States*,[152] the courts rejected a construction of Title VII that would have had the effect of "freez[ing] an entire generation of Negro employees into discriminatory patterns that existed before the act."[153]

Quarles afforded relief to incumbent black employees who worked in segregated departments prior to the effective date of the Act.[154] The employees challenged restrictive, but facially neutral, transfer and seniority provisions of a collective bargaining agreement that made it impossible or costly for black incumbents to secure positions in predominantly white, higher paying departments.[155] The court struck down the neutral transfer and seniority practices because the practices had the effect of perpetuating the company's pre-Act intentionally discriminatory policy of segregation.[156]

Elaborating on the theory of *Quarles*, Judge Wisdom in *Pa-*

149. *See, e.g.*, Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426–28 (8th Cir. 1970).

150. *See, e.g.*, Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988–91 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 510–19 (E.D. Va. 1968). The effects test or disparate impact analysis is no longer available to challenge seniority systems because of Supreme Court rulings construing section 703(h) as providing an exemption for bona fide seniority systems that are not intentionally created or maintained for discriminatory purposes. American Tobacco Co. v. Patterson, 456 U.S. 63, 70 (1982); International Bhd. of Teamsters v. United States, 431 U.S. 324, 353–54 (1977).

151. 279 F. Supp 505 (E.D. Va. 1968) (Butzner, J., sitting by designation).

152. 416 F.2d 980 (5th Cir. 1969) (Wisdom, J.), *cert. denied*, 397 U.S. 919 (1970).

153. Quarles v. Phillip Morris, Inc., 279 F. Supp. at 516 (E.D. Va. 1968), quoted with approval in Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d at 987–88 (5th Cir. 1969).

154. Quarles v. Phillip Morris, Inc., 279 F. Supp. at 508 (E.D. Va. 1968).

155. *Id.* at 512–14. Essentially, the challengers objected to the seniority system that based most opportunities for advancement on departmental rather than employment seniority. *Id.* at 513.

156. *Id.* at 517–19. The *Quarles* doctrine is commonly referred to as the "present effects of past discrimination" theory:

> *Quarles* originated the category of discrimination known as perpetuation in the present of the effects of past discrimination, holding that a seniority and transfer system constituted present discrimination and violated Title VII if it locked members of a previously discriminated-against protected group into inferior positions in which they had origi-

permakers first employed the business necessity test as a mechanism for determining those adverse effects that would be considered justifiable under Title VII.[157] The primary challenge in *Papermakers* was to the practice of awarding jobs based on *job* seniority rather than *mill* or plant seniority.[158] Plaintiffs claimed that because jobs and lines of progression had formerly been segregated by race, black incumbents did not presently have an equal opportunity to attain job seniority and to compete for the more desirable jobs.[159] Judge Wisdom required the employer to show that a facially neutral but harmful practice was "essential to the safe and efficient operation"[160] of the business. Given the context of *Papermakers*, the stringency of the test is not surprising: the employer's prior discrimination, combined with the "lock-in" effect of the seniority and transfer provisions, insured that blacks hired before 1966 would be relegated to a position of "permanent inferiority" unless Title VII provided a remedy.[161] The remedy actually imposed was, however, conservatively tailored to compensate only the actual victims of prior discrimination and was not intended to eradicate all adverse effects on minority employees that were traceable in any way to the employer's prior discrimination.[162]

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nally been placed as a result of [pre-Act] discrimination which was itself beyond the reach of the court.

B. SCHLEI & P. GROSSMAN, *supra* note 12, at 30.

The Supreme Court no longer permits use of the present effects of past discrimination theory in cases challenging seniority systems and instead requires proof of discriminatory motivation. International Bhd. of Teamsters v. United States, 431 U.S. 324, 352–56 (1977); United Air Lines, Inc. v. Evans, 431 U.S. 553, 558–60 (1977). *See generally* C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 12, at § 1.2.

157. *Local 189, United Papermakers & Paperworkers*, 416 F.2d 980, 989 (5th Cir. 1969).

158. *Id.* at 984–85. Under the job seniority system, a worker with the most years in the job slot below the vacancy had first call. Time worked in the mill was not important to determining first bidding rights.

159. *Id.* at 982–86. For a thorough discussion of the complex factual context in *Papermakers*, see Bullock, *The Focal Issue: Discriminatory Motivation or Adverse Impact?*, 34 LA. L. REV. 572, 578–79 (1974).

160. 416 F.2d at 989.

161. *Id.*

162. *Id.* at 988–90. In his discussion concerning the obligation of an employer to undo the effects of past discrimination, Judge Wisdom discussed the remedial theories presented in a student law review note. *See* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1268–75 (1967). Under one theory—the "freedom now" theory—the employer would be required to remedy all effects of previous discrimination by restructuring the system and by hiring new black workers to replace incumbent whites who held jobs that they otherwise would not have held "but for" the prior discrimination. Judge Wisdom rejected this theory in favor of the more moderate "rightful place" doctrine that requires only an adjustment in competitive standing of white and black workers with regard to future job openings arising in the normal course of the employer's business. Under the "rightful place" doctrine, white incumbent workers are not bumped out of their present positions by

The impact of *Papermakers* soon extended beyond its original context to govern two different kinds of impact cases. First, it was relied on by the eighth circuit in a "present-effects-of-past-discrimination" context. The case concerned minority workers who, while not the actual victims of the employer's prior discrimination, were the primary beneficiaries of the remedial measures.[163] Second, the business necessity test dramatically surfaced as the appropriate formula for judging the validity of a neutral practice that did not build upon prior *employer* discrimination, but served instead merely to reinforce the adverse effects of *societal* discrimination. In *Gregory v. Litton Systems, Inc.*,[164] a federal district court in California struck down the employer's policy of disqualifying "frequently-arrested" persons because the policy had the "foreseeable effect of denying black applicants an equal opportunity for employment."[165] This foreseeability arose solely from the disproportionate percentage of blacks arrested[166] rather than any conduct on the part of the employer. Without elaboration, the court noted that the policy was "not justified or excused by any business necessity,"[167] thus accepting the formulation of *Papermakers* in a "pure" adverse impact case devoid of any pre- or post-Act intentional discrimination by the employer.[168]

These cases represented a significant extension of the holding of *Papermakers* because they disturbed practices that were not entirely—or not at all—traceable to employer wrongdoing. Intriguingly, however, if the reasoning of Judge Wisdom's scholarly and perhaps prescient opinion in *Papermakers* is traced to its logical conclusions, the rationale for such an extension can be found implicit in his analysis.

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blacks who have greater plant seniority. *United Papermakers & Paperworkers*, 416 F.2d at 988–89.

163. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426–28 (8th Cir. 1970).

164. 316 F. Supp. 401 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (4th Cir. 1972).

165. *Id.* at 403.

166. Although blacks made up only 11% of the national population, they accounted for 27% of all arrests, including 45% of the arrests reported as "suspicion arrests." *Id.* at 403.

167. *Id.* at 402–03. When the employer adopts a policy of disqualifying applicants based on prior convictions, rather than prior arrests, the policy may sometimes survive Title VII scrutiny. *See, e.g.*, King v. Girard Bank, 17 F.E.P. 131, 134–35 (E.D. Pa. 1978) (discharge of employee for falsifying information relating to prior conviction was proper due to sensitive nature of banking position); Richardson v. Hotel Corp. of America, 332 F. Supp. 519, 521 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972) (employer entitled to use prior convictions for serious property-related crime as disqualification for "security sensitive" job). *But see* Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1298–99 (8th Cir. 1975) (absolute ban on hiring any person convicted of non-traffic offense violated Title VII).

168. The *Gregory* court explicitly relied on *Papermakers* to justify its decision to dispense with the intent requirements and to use business necessity as the standard of liability in disparate impact cases. 316 F. Supp. at 403.

First, Judge Wisdom characterized the EEOC's position that only job-related tests would conform to Title VII, as a logical outgrowth of the more general theory that present discriminatory effects should be tolerated only if justified by business necessity.[169] It is not entirely clear from this characterization whether Judge Wisdom thereby meant to limit his endorsement of the EEOC's position only to instances in which an employer's current practice reinforced prior overt discrimination practiced by that employer. A basis for a broader application of the business necessity test, however, can be found elsewhere in the opinion. Using an oft-repeated hypothetical regarding typing, Judge Wisdom explained:

> Not all "but for" consequences of pre-Act racial classification warrant relief under Title VII. For example, unquestionably Negroes, as a class, educated at all-Negro schools in certain communities have been denied skills available to their white contemporaries. That fact would not, however, prevent employers from requiring that applicants for secretarial positions know how to type, even though this requirement might prevent Negroes from becoming secretaries.[170]

The court then compared the typing case to the situation presented in *Local 53 of the International Association of Heat & Frost Insulators & Asbestos Workers v. Vogler*,[171] in which a union, guilty of overt discrimination in the past, used a nepotism rule that would likely have had the effect of completely excluding blacks on a permanent basis:

> The controlling difference between the hypothetical typing requirement and the nepotism rule rejected in *Vogler* is *business necessity*. When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding, legitimate non-racial business purpose. Secretaries must be able to type. There is no way around that necessity. A nepotism rule, on the other hand, while not unrelated to the training of craftsmen, is not essential to that end. To be sure, skilled workers may gain substantial benefits from having grown up in the home of a member of the trade. It is clear, nonetheless, that the benefits secured by nepotism must give way because of its effective continuation and renewal of racial exclusion.[172]

From this more general discussion, it is fair to infer that Judge Wisdom would not limit the application of the business necessity test to the narrow kind of case before him, *i.e.*, the use of a neutral device which served to perpetuate the precise discriminatory effects created originally by the employer's overt discrimina-

169. 416 F.2d at 989–90.
170. *Id.* at 988.
171. 407 F.2d 1047 (5th Cir. 1969).
172. 416 F.2d at 989 (footnote omitted).

tion. Both the nepotism rule in *Vogler* and the job seniority and transfer system in *Papermakers* built upon the defendant's prior overt discrimination in a kind of offensive Catch-22 fashion.[173] Thus, a black who wanted to join Local 53 prior to Title VII's effective date would have been told that the union accepted only whites. If the rejected applicant's son tried to join after Title VII became effective, he would have been rejected under the nepotism rule challenged in *Vogler* because his father was not a member of the union. Similarly, as in the more complex *Papermakers* situation, blacks who had been excluded from the more lucrative white jobs prior to the Act would now find it difficult, if not impossible, to move into those higher-paying jobs because they did not possess the requisite job seniority. In other words, the defendants in both of these cases were responsible, without the aid of outside forces, for the inferior position of the plaintiff class—first by means of overt discrimination, then by perpetuating the results of such discrimination by facially neutral practices.

Challenges to hiring tests, such as the hypothetical typing test, however, are qualitatively different from these Catch-22 situations. An employer who uses a neutral test to select employees, whether or not guilty of overt discrimination in the past, may at most build upon or exaggerate the deprivations caused by societal discrimination. It is hard to imagine how the use of a facially neutral pre-employment test could currently interact with an employer's prior overt discrimination in the same Catch-22 fashion as a nepotism or seniority rule, unless, of course, the employer itself had previously given training for the tests only to whites. Thus, when a testing device is at issue, there must be a judgment made as to whether the employer's action in using the neutral testing device, when coupled with societal discrimination, violates Title VII. By justifying the typing test under the business necessity standard, Judge Wisdom implicitly acknowledged that such non-Catch 22 employment barriers should also be subjected to a probing review under Title VII, at least when the defendant had been guilty of pre-Act discrimination. Thus, based on the typing hypothetical and his endorsement of the EEOC's position requiring job-related tests, it appears that Judge Wisdom would require the employer who had discriminated in the past to refrain from use of

173. Compare the operation of "grandfather" clauses in state voting legislation whereby black persons were required to pass literacy tests or were otherwise impeded in their exercise of the franchise simply because their ancestors had been overtly denied the right to vote. In these cases, the justification for imposition of liability is that the defendant's own prior discrimination made it impossible for the challengers to qualify to vote under the present "neutral" terms imposed by the defendant. Guinn & Beal v. United States, 238 U.S. 347, 364–65 (1915); Meyers & Others v. Anderson, 238 U.S. 368, 380 (1915).

tests that failed to erase the effects of prior discrimination, unless justified by business necessity.

The remaining question is whether the business necessity test should be extended to instances in which an employer's use of a test builds upon societal discrimination, even though the employer is not guilty of any pre-Act discrimination. Although *Papermakers* does not address this question, Judge Wisdom's rationale again suggests an affirmative answer. Once it is determined that employers guilty of past discrimination should compensate for *societal* discrimination, as such discrimination is reflected in the employer's present neutral practices, we have departed from employer intent as the sole basis of liability and are no longer confining the remedy only to effects traceable to overt employer discrimination.[174] Consequently, to then insist that *only* employers guilty of pre-Act discrimination should be liable for neutral practices that renew or recreate discriminatory effects, although not irrational, must depend on a very rough kind of justice requiring that "guilty" parties alone should pay for societal discrimination, regardless of the lack of any direct causation.[175] When there is no causal connection between the employer's prior discriminatory acts and the current discriminatory effects, the significance of the employer's prior discriminatory intent greatly diminishes. In

174. Contrast the approach taken in the school desegregation cases, where the Court has premised liability on the existence of prior segregative intent by defendant school boards and has constructed an elaborate evidentiary scheme to trace present discriminatory effects to past overt discrimination. *E.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537–42 (1979); Keyes v. School District No. 1, 413 U.S. 189, 206–11 (1973). The Court in school desegregation cases is thus wedded to a "present effects of past discrimination" approach and refuses to adopt pure impact theory whereby de facto segregation alone would be actionable. For a discussion of the role of intent in school desegregation cases, see P. Shane, School Desegregation Remedies and the Fair Governance of Schools at 76-89 (1983) (unpublished manuscript) (on file at *UCLA Law Review*).

The Court has also adhered to the intent requirement in voter dilution cases but has had considerable difficulty tracing invidious intent to current disparate effects in elections. *See* Rogers v. Lodge, 102 S. Ct. 3272, 3275–81 (1982); City of Mobile v. Bolden, 446 U.S. 55, 66–74 (1980).

175. It could be argued, for example, that even though an employer's past intentionally discriminatory acts did not *directly* contribute to the disadvantage minorities currently experience when taking neutral pre-employment tests, such intentional discrimination nevertheless *indirectly* contributed—perhaps because of resulting economic harms—to those educational, psychological or other disabilities that may disadvantage minorities now taking such tests. To impose liability differentially on this basis on employers guilty of past discrimination, however, would be to impose blame unjustifiably based on an attenuated version of causation. It could as easily be argued—and be disproved with no less difficulty—that nondiscriminatory employers who in the past did not practice affirmative action are just as responsible for the current adverse effects of neutral employment practices that lock in past societal discrimination.

contrast, extending liability to all employers who use unjustified practices that build upon societal discrimination, regardless of pre-Act discrimination, eliminates difficult judgments as to blameworthiness and is reflective of a utilitarian approach that seeks to eliminate all arbitrary barriers to achieving a specific goal—expanding opportunities for Title VII beneficiaries. The divorce from an intent-based system is thus complete and the elements of such an approach can be found implicit in the *Papermakers* analysis.

Papermakers was not cited in the unanimous Supreme Court decision in *Griggs v. Duke Power Co.*,[176] the Court's first endorsement of impact theory. But *Griggs* is very much the offspring of Judge Wisdom's earlier decision, in language as well as theory.[177] Most significantly, *Griggs* has been interpreted as an endorsement of "pure" disparate impact theory in which the intent of the employer is not a critical factor.[178]

Griggs invalidated an employer's use of educational[179] and testing[180] requirements for hiring and transfer that had a significant adverse effect on blacks.[181] The Court imposed liability despite its agreement with the lower court's finding that the

176. 401 U.S. 424 (1971). Both parties, however, cited *Papermakers* in their briefs, *see* Brief for Petitioners at 16, 26, 28, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Brief for Respondent at 49, 50, Griggs v. Duke Power Co., 401 U.S. 424 (1971), as did the Attorney General for the State of New York and the United States in their amicus curiae briefs in support of plaintiff. Brief of Attorney General of the State of New York as Amicus Curiae in Support of Reversal at 9, 19, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari at 11, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

177. The Supreme Court in *Griggs* was also influenced by Judge Sobeloff's dissenting Court of Appeals opinion. Griggs v. Duke Power Co., 420 F.2d 1225, 1237 (1970) (Sobeloff, J., dissenting); *see* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 78 (1972) [hereinafter cited as Blumrosen, *Strangers in Paradise*].

178. *See, e.g.*, cases cited *supra* note 55.

179. Duke Power Company formerly had required a high school education for any initial assignment to a department other than the low-paying, previously segregated, Labor Department and for most transfers between departments. 401 U.S. at 427. After July 1965, the Company allowed incumbent employees who lacked a high school education to transfer to one of the higher-paying departments if they passed two general intelligence tests. *Id.* at 427–28.

180. After Title VII became effective, the Company required applicants to pass two general intelligence tests—the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test—to qualify for initial placement in any department other than the Labor Department or to become eligible to transfer to the four higher-paying departments. *Id.* at 428.

181. According to 1960 census statistics, in North Carolina, the site of Duke Power Company, 34% of white males and 12% of black males completed high school. *Id.* at 430 n.6. For proof of the disparate impact of the general intelligence tests on blacks, the Supreme Court cited an EEOC decision that showed 58% of whites but only 6% of blacks passed a battery of tests that included the Wonderlic and Bennett tests. *Id.*

requirements were not the product of discriminatory intent.[182]

The essential similarity in approach between *Griggs* and *Papermakers* lies in the Supreme Court's abandonment of the intent requirement[183] and its acceptance of business necessity as the primary determinant of liability in a disparate impact case.[184] In an opinion reminiscent of Judge Wisdom's attempt to reconcile the early effects cases, Chief Justice Burger, writing for the Court in *Griggs*, stated that:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[185]

It is clear after *Griggs* that the Supreme Court will not be satisfied with an employer's mere assertion of a nondiscriminatory purpose for a challenged policy or practice that has an adverse impact on a protected group.[186] At the least, the Court will demand that the employer show a "demonstrable"[187] or "manifest"[188] relationship between the practice and the nondiscriminatory purpose. *Griggs* thus established that practices carrying adverse group impact must be justified, without furnishing a complete structure for the impact case or delineating the precise contours of the business necessity defense.[189]

Given the variety of business practices potentially covered by Title VII, it is not surprising that the ten years of litigation since

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182. *Id.* at 432. Duke Power, however, had been guilty of pre-Act discrimination. Prior to the date Title VII became effective, the Company only employed blacks in the Labor Department. The highest paid workers in the Labor Department were paid less than the lowest paid workers in the other four all-white departments. *Id.* at 427.

183. *Id.* at 430.

184. *Id.* at 431.

185. *Id.*

186. The *Griggs* Court did not explicitly adopt *Papermakers'* stringent definition of business necessity that required that the practice be "essential to the safe and efficient operation" of the business. Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 989 (1969). This failure, however, might be attributable to the fact that such a broad endorsement was unnecessary in *Griggs* because Duke Power based its case primarily on its lack of discriminatory intent and did not even attempt to prove that its requirements were job-related. *See Griggs*, 401 U.S. at 431. The "safe and efficient job performance" definition was later cited with approval in Dothard v. Rawlinson, 433 U.S. 321, 331-32 n.14 (1977).

187. *Griggs*, 401 U.S. at 431.

188. *Id.* at 432.

189. By construing § 703(h) of Title VII, reprinted *supra* note 145, as insulating only tests shown to be job-related, the Court put tests on a par legally with other selection devices, such as educational requirements, that are potentially vulnerable under a "pure" disparate impact analysis, if they produce adverse impact. Indeed, the Supreme Court has never used § 703(h) to justify treating tests differently from other selection devices. *See* Connecticut v. Teal, 457 U.S. 440, 452 (1982) (Section 703(h) does not provide "special haven" for discriminatory tests).

Griggs have not provided definitive answers to the questions left open by *Griggs*. There is still much controversy regarding the reach of Title VII. Behind the difficulties in framing the contours of the business necessity test[190] and otherwise structuring the impact case[191] lies a more basic theoretical problem: the problem is to provide a definition of "adverse impact" that accords with its function as a key determinant of liability.

Defining what constitutes "sufficient" adverse impact on the group to trigger the justification requirement has proven to be far more difficult than simply articulating the basic elements of disparate impact theory. The Court's rejection of the "bottom line" concept has eased the confusion in one respect: it clearly holds that disparate impact theory was not to be confined only to those settings in which the defendant has failed to provide sufficient opportunities for minorities in proportion to the available labor force.[192] Yet, at the same time, the Court's disavowal of the bottom line principle brings into question the rationale for confining the justification requirement to cases of systematic group disadvantage. After *Teal*, adverse impact is still the touchstone for non-intent based liability, but the concept of adverse impact is not exclusively associated with an assessment of group opportunity as measured in its most concrete form—the overall result of the hiring or promotion process.[193] A theory that will reconcile this refined definition of adverse impact, now divorced from the bottom line principle, with the continuing use of adverse impact as the triggering mechanism for justification has yet to be articulated by the Court. Absent such a theory, *Teal* may exacerbate the tension between the two conceptions of equality previously endorsed by the Court and may serve to discredit the legitimacy of the group-oriented conception underlying disparate impact analysis.

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190. For a discussion of the various formulations of business necessity defense, see Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981), and *supra* note 74.

191. For discussion of the question of allocation of burdens of production and persuasion in disparate impact cases, see Furnish, *supra* note 79, at 419. *See also supra* note 74.

192. See discussion of *Teal supra* text accompanying notes 29–37 and *infra* text accompanying notes 229–46.

193. *Teal* did not, however, decide whether the bottom line principle could be used aggressively by plaintiffs to prove adverse impact. *Teal* addressed only the defensive use of the principle by employers. The bottom line principle may aid plaintiffs in unusual cases in which none of the components of a multistage selection process has a substantial disparate impact, but the cumulative or bottom line effect of the components nevertheless discloses such a substantial adverse effect. *See* Vulcan Society of the N.Y. City Fire Dep't, Inc. v. Civil Serv. Comm'n, 360 F. Supp. 1265, 1267–72 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973). Such an aggressive use of the bottom line focus would not appear to be as destructive of individual minority interests and thus may well survive *Teal*. *See supra* text accompanying notes 255–56.

II. THE "BOTTOM LINE" DEBATE: TENSIONS IN DISPARATE IMPACT THEORY

A. *Evolution of the Bottom Line Debate*

1. Developments Before *Teal*

The sharp split on the Court in *Teal*[194] accurately mirrored the competing concerns that had prevented both the federal enforcement agencies[195] and the lower courts[196] from reaching complete agreement as to the legal sufficiency of the bottom line focus. Unlike the *Teal* majority's wholesale rejection of the bottom line principle, however, both the agencies and a majority of lower courts displayed a limited approval of the principle, if only in a tentative, grudging manner. In this sense, the *Teal* decision represented not only an important shift in direction in the law but one that was not clearly foreshadowed by the Court's own prior decisions.[197]

The positions of the federal agencies[198] responsible for enforcing antidiscrimination employment laws had evolved over a decade to a point where each agency agreed to use the bottom line principle to guide its exercise of prosecutorial discretion. Prior to the adoption of the Uniform Guidelines on Employee Selection Procedures in 1978,[199] there was a sharp dispute among the agencies regarding the appropriateness of the bottom line focus.[200]

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194. For a listing of the Justices in the majority and dissent in *Teal*, see *supra* notes 24–25.

195. *See infra* text accompanying notes 198–209.

196. *See infra* text accompanying notes 210–15.

197. *See infra* text accompanying notes 216–28.

198. The three agencies that currently share the major responsibility for enforcing antidiscrimination in employment laws and policies are the EEOC and the Departments of Justice and Labor. In 1979, the EEOC was given the responsibility for assuring equal opportunity in federal employment, replacing the functions formerly performed by the Civil Service Commission. Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1979). This current organization reflects significant changes made during the Carter Administration whereby the EEOC was given greater responsibility for leadership and coordination of federal efforts. *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), and Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (1978).

The Department of Labor was also vested with greater authority to oversee the contract compliance program requiring government contractors both to refrain from discrimination in employment and to engage in affirmative action. Exec. Order 12,086, 43 Fed. Reg. 46,501 (1978). One district court, however, has recently declared the Reorganization Act of 1977 unconstitutional because the legislation contains a one house veto provision. EEOC v. Allstate Ins. Co., 52 U.S.L.W. 2152–53 (S.D. Miss. 1983). Reorganization Plan No. 1 of 1978 was issued pursuant to the authority of the 1977 Act and is also constitutionally vulnerable.

199. 29 C.F.R. § 1607 (1983).

200. For an insider's view on the background leading to the adoption of the bottom line provisions of the Uniform Guidelines on Employee Selection Procedures, see Blumrosen, *The Bottom Line in Equal Employment Guidelines*, *supra* note 143, at 323.

Three agencies[201] issued guidelines that relied on the bottom line focus to determine adverse impact. These agencies generally would not prosecute unless such discriminatory end results were present.[202] The EEOC, on the other hand, informally took the position that the bottom line principle was legally inappropriate[203] and reserved the option of prosecuting employers that used unvalidated selection components, even if the employer's overall work force was racially and sexually balanced.[204]

By 1978, the agencies reached agreement and the new Uniform Guidelines reflected the bottom line approach as a matter of policy, if not of law.[205] The enforcement agencies announced that, in the exercise of their prosecutorial discretion, they would ordinarily institute actions only against employers who failed the bottom line test and thus "whose practices have restricted or excluded the opportunities of minorities and women."[206] The agencies made clear, however, that their position was not predicated on the "underlying question of law"[207] but instead was a means of allocating limited government resources in a sensible way. Consistent with their reluctance to express a view as to the legal propriety of the bottom line principle, the agencies reserved the right to intervene in certain exceptional cases, notwithstanding the fact that the employer's policies satisfied the bottom line test.[208] The

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See also Report by the United States General Accounting Office, 2 EMPL. PRAC. GUIDE (CCH) ¶ 5062 (July 30, 1982).

201. The three agencies that relied on the bottom line principle to determine the existence of group adverse impact were the Departments of Justice and Labor and the Civil Service Commission. The enforcement functions of the Civil Service Commission relating to equal opportunity in federal employment were later transferred to the EEOC. *See supra* note 198.

202. "If . . . the total selection process for a job has no adverse impact, the individual component of the selection process need not be evaluated separately for adverse impact." Federal Executive Agency Guidelines on Employee Selection Procedures, 41 Fed. Reg. 51,734, 51,737 (Dep't of Justice); 51,745 (Dep't of Labor); 51,753 (Civil Service Comm'n) (1976).

203. *See* Blumrosen, *The Bottom Line in Equal Employment Guidelines*, *supra* note 143, at 330–31.

204. *See* Section 1607.3 of the 1970 EEOC Guidelines on Employee Selection Procedures (republished the day after the FEA Guidelines were published), 41 Fed. Reg. 51,984 (1976).

205. Supplementary Information, Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,291 (1978).

206. *Id.*

207. *Id.* The Office of Federal Contract Compliance Programs (OFCCP), the arm of the Department of Labor responsible for administering Executive Order 11246 (*see supra* note 198), has declared that *Teal* does not repudiate the position of the Uniform Guidelines and that it will continue to rely on the bottom line standard in exercising its prosecutorial discretion to institute actions against government contractors. OFCCP Order No. 660f12, Transmittal No. 26, *reprinted in* 2 EMPL. PRAC. GUIDE (CCH) ¶ 5078 (Jan. 4, 1983).

208. Section 4C of the Uniform Guidelines, 29 C.F.R. § 1607.4C (1983), states

intragovernmental tension over application of the bottom line principle persisted up to the moment *Teal* was decided. In an amicus brief which the EEOC refused to join,[209] the Justice Department argued that employers should be able to rely on the bottom line principle as a legal defense.

The turbulence in the federal agencies was reproduced in the lower courts, which struggled with the bottom line question in a variety of contexts. Unlike the federal agencies, however, the lower courts did not have the luxury of refraining from judgment as to the legality of the bottom line principle. The majority of courts endorsed the bottom line approach,[210] particularly when the challenged selection component either did not operate as a pass/fail barrier to securing employment benefits[211] or was offset by a conscious affirmative action program instituted by the employer.[212]

Unquestionably, the Second Circuit's decision in *Teal* represented the strongest expression of sentiment in opposition to the bottom line focus. The Second Circuit, however, was not alone in questioning the propriety of the principle in particular contexts.[213]

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that in the following circumstances employers are expected to validate an individual component of a selection process for adverse impact and the failure to do so may result in enforcement action:

> (1) [w]here the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

209. Brief for the United States as Amicus Curiae at 1 n.1, Connecticut v. Teal, 457 U.S. 440, 442 (1982).

210. *See, e.g.*, EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980); EEOC v. Navajo Refining Co., 593 F.2d 988 (10th Cir. 1979); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978); Rule v. International Ass'n of Ironworkers Local 396, 568 F.2d 558 (8th Cir. 1977); Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934, *reh'g denied*, 429 U.S. 933 (1976). *Cf.* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 425 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976), *reh'g denied*, 429 U.S. 1124 (1977) (holding that if the overall examination procedure produces disparate results, defendant cannot rebut such a bottom line by fragmenting the process and establishing that no disparate impact stems from separate component parts).

211. *Rule*, 568 F.2d at 565 n.10; Smith v. City of East Cleveland, 363 F. Supp. 1131, 1134 (N.D. Ohio 1973), *aff'd*, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934, *reh'g denied*, 429 U.S. 933 (1976); Lee v. City of Richmond, 456 F. Supp. 756, 771 (E.D. Va. 1978).

212. *Navajo Refining Co.*, 593 F.2d at 990; Brown v. New Haven Civil Serv. Board, 474 F. Supp. 1256, 1263 (D. Conn. 1979).

213. *See, e.g.*, League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 895 (C.D. Cal. 1976). The *Santa Ana* court declared that the bottom line

The boldness of *Teal* lay in the refusal to permit an employer who engaged in affirmative action to insulate itself completely from Title VII liability.[214] The other courts that had been unenthusiastic in their reception of the bottom line principle had not grappled with an employer's conscious use of affirmative action as an offsetting device. They had been concerned, instead, with unexplained discrepancies between the expected effect of a challenged test or other selection device and the seemingly balanced character of the results of a defendant's overall selection process.[215]

The Supreme Court's decisions prior to *Teal*[216] also reflected at least a limited approval of the bottom line focus similar to the qualified acceptance of the bottom line principle given by the agencies and most lower courts. Two decisions especially difficult to square with the Court's position in *Teal* are *Furnco Construction Corp. v. Waters*[217] and *Espinoza v. Farah Manufacturing Co*.[218]

In *Furnco*, three qualified black bricklayers challenged the

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principle was at odds with its conception of Title VII as protecting *individuals*, rather than *groups*, from discrimination. However, in *Santa Ana*, the apparent bottom line balance, as measured by applicant flow data, was most probably due to the chilling effect of the challenged height and education requirements. *Id.* at 882.

214. Teal v. Connecticut, 645 F.2d 133, 139–40 (2d Cir. 1981), *aff'd and remanded*, 457 U.S. 440 (1982).

215. I.M.A.G.E. v. Bailar, 26 EMPL. PRAC. DEC. (CCH) ¶ 31,870 (N.D. Cal. 1981); Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952, 963–70 (D.D.C. 1980), *aff'd*, 702 F.2d 221 (D.C. Cir. 1981); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 894–95 (C.D. Cal. 1976).

216. Three other Supreme Court opinions might also be read to provide some implicit support for the bottom line principle. In both Washington v. Davis, 426 U.S. 229 (1976), and New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), the Court took a very lenient view of intensity of the showing an employer must make to justify use of a practice that produce adverse impact. It could be argued that the Court's willingness to give credence to the employer's defense in these cases may have been attributable to the claimant's failure to convince the Court that the challenged practice produced overall adverse results. In *Davis*, the Court noted that the racial makeup of the employer's work force "might be roughly equivalent to the racial makeup of the surrounding community, broadly conceived. . . ." 426 U.S. at 237. In *Beazer*, the Court recognized that the defendant employed more than twice the percentage of blacks and Hispanics than were represented in the New York Metropolitan labor force. 440 U.S. at 584 n.25. Similarly, the Court's decision in County of Los Angeles v. Davis, 440 U.S. 625 (1979), is most compatible with acceptance of a bottom line focus. The lower court in that case enjoined the defendant from using an unvalidated written civil service examination that had an adverse effect on minorities. The defendant then tempered the overall effect of the exam by incorporating other affirmative action-oriented components into the hiring process. Given these reforms, the Court declared the case moot, again apparently accepting the propriety of focusing on overall hiring results. 440 U.S. at 631–32. *See* Note, *Rebutting the* Griggs *Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, 1981 U. ILL. L. REV. 181 (1981). For a discussion of *Washington v. Davis* as a bottom line case, see Blumrosen, *Developments in Equal Employment Opportunity Law—1976*, 36 FED. B.J. 55, 62-64 (1977).

217. 438 U.S. 567 (1978).

218. 414 U.S. 86 (1973).

defendant company's hiring system of refusing to hire at the gate and selecting only persons known to the job superintendent as experienced or "who had been recommended to him as similarly skilled."[219] Without more, the company's word of mouth system would have produced a disproportionately low number of black hirees, because most of the workers with whom the superintendent was familiar were white.[220] Prompted by past charges of discrimination, however, the company engaged in effective affirmative action efforts which resulted in a work force exceeding the predictable number of blacks, given the racial composition of the relevant labor force.[221]

For all but two members[222] of the Court, the bottom line hiring figures were enough to dispense with the plaintiffs' disparate impact challenge. The Court instead concentrated almost exclusively on why the plaintiffs should not prevail on their disparate treatment claim.[223]

If the bottom line question did not strike so closely at the heart of the concept of equality under Title VII, it would have been safe to regard *Furnco* as a clear, albeit implicit, endorsement of the bottom line principle by the Supreme Court.[224] When stripped of the merely coincidental factual peculiarity that the affirmative action measures in *Furnco* took the same non-objective form, *i.e.*, word of mouth recruiting, as the challenged hiring practice, the problem presented in *Furnco* is not materially different from that posed in *Teal*. Both cases involved correcting or offsetting affirmative action efforts that failed to reach that subclass of blacks who were shut out of the selection process at the outset—by failing to pass the written examination in *Teal*; by not appearing on the superintendent's initial list in *Furnco*. The cases are also factually analogous because the disappointed minority applicants in each were faced with a system that excluded individuals who were arguably qualified to perform the work, simply because they were not included within the minority pool subject to affirmative

219. 438 U.S. at 569–70.

220. *Id.* at 580 n.9.

221. A study conducted by the local labor union showed that 13.7% of the union members were black. For the job in question, 20% of the bricklayers hired by Furnco were black and 13.3% of the man-days were worked by black bricklayers. *Id.* at 571 n.2.

222. Justices Marshall and Brennan dissented on the Court's treatment of plaintiff's disparate impact claim. *Id.* at 581.

223. The Court held that the Court of Appeals had erred in equating a prima facie showing under *McDonnell Douglas*, 411 U.S. at 802, with an ultimate finding of unlawful discrimination. The Court also faulted the lower court for imposing alternative hiring practices upon the defendant employer, absent proof of discriminatory intent. *Furnco Constr. Corp.*, 438 U.S. at 576–77.

224. *Furnco Constr. Corp.*, 438 U.S. at 584 (Marshall, J., dissenting).

action. In fact, *Furnco* can be distinguished from *Teal* only by focusing narrowly on the *Furnco* plaintiffs' failure to quantify the disproportionate effects that a subjective hiring process would tend to have on minority workers and to establish that the plaintiffs were likely to be foreclosed from the affirmative action pool on a more permanent basis.[225]

The Court's implicit endorsement of the bottom line principle in *Furnco* was foreshadowed by an earlier, although equally veiled, approval in *Espinoza v. Farah Manufacturing Co*.[226] The selection procedure challenged in *Espinoza* was a prohibition against hiring aliens. The plaintiff, an alien of Mexican descent, logically claimed that the procedure was likely to have a discriminatory effect on persons of Mexican descent. In rejecting the plaintiff's claim, the Supreme Court first declared that the prohibition against national origin discrimination in Title VII was not intended to encompass discrimination based only on alienage.[227] The Court then pointed to "bottom line" figures that disclosed that over 95% of defendant's work force were U.S. citizens of Mexican descent.[228] Again, the fact that the citizenship requirement obviously would have a disproportionate tendency to exclude persons of Mexican descent was overshadowed by the actual hiring picture. Thus, the bottom line principle provided implicit support for the Court's rationale in *Espinoza* as well as *Furnco*.

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225. In subjective hiring cases, however, bottom line figures, *i.e.*, the overall results of defendant's subjective processes, are often the only data source to which plaintiff may point to support its claim of adverse impact. In these subjective hiring cases, it may be impossible to quantify separately the effects of the "components" of the hiring process. *Furnco* was thus an unusual case in that plaintiffs could point to the superintendent's list as a "subjective" component that independently tended to select workers in a discriminatory manner.

Although there has been some reluctance to apply disparate impact analysis to test the validity of discretionary policies, *e.g.*, Smithers v. Bailar, 629 F.2d 892, 898–99 (3d Cir. 1980), the nature of disparate impact theory does not foreclose such an application. Professors Baldus and Cole explain:

> [U]nder present law once a plaintiff can show that a discretionary selection process has produced a substantial disproportionate impact, an inference of disparate treatment will arise unless the defendant can demonstrate that legitimate factors produced the disparity. When this showing is made, the logic of the disparate impact doctrine requires a justification of the demonstrated causal factors, whatever their nature. In short, any rule or procedure which can refute an inference of intentional discrimination should be a proper subject of attack under a disparate impact theory.

D. BALDUS & J. COLE, *supra* note 12, at § 1.23. *See, e.g.*, Hung Ping Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982) (disparate impact theory available to challenge subjective hiring decisions).

226. 414 U.S. 86 (1973).

227. *Id.* at 91.

228. *Id.* at 93.

2. *Connecticut v. Teal*

In rejecting the bottom line principle, the majority in *Teal* relied less on precedent than on its view of the conception of equality embodied in Title VII, as gleaned principally from the language and legislative history of the Act. Justice Brennan's majority opinion stressed that the guarantee of equality in Section 703(a)(2) of Title VII centered on individuals rather than groups[229] and protected each individual from discrimination, regardless of the fate of other members of the plaintiff's racial group.[230] For Justice Brennan, the equality of opportunity promised by Title VII meant that each individual black employee who sought promotion must have "the *opportunity* to compete equally with white workers on the basis of job-related criteria."[231]

In the majority's view, adoption of the bottom line principle would clash with the concern of *Griggs* that minority workers not be handicapped by unvalidated selection devices that operate as barriers in the form of "built-in headwinds" against securing equal opportunities.[232] The Court reasoned that *Griggs* supported the decision to measure adverse impact at the testing or "component" stage, rather than to focus on the more comprehensive measure of the effect of the overall selection process.[233] By carefully scrutinizing even isolated components of a selection procedure that operate to deny individual minority members the chance to compete for a job, the majority believed that it was adhering to the interpretation of discrimination most faithful to the guarantee of Section 703(a)(2). For the majority, the critical aspect of Section 703(a)(2) is that it speaks "not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*."[234]

The most notable feature of the majority opinion lies in a coupling of the Court's continued approval of the use of disparate impact theory of liability with its endorsement of an individual-centered conception of equality. The Brennan opinion in *Teal*, although interpreting a theory of liability based on adverse group impact, nonetheless regards *Griggs* as enforcing a kind of competitive equality among *individuals* in the workplace.[235] *Teal*'s imple-

229. *Teal*, 457 U.S. at 453–54.

230. *Id.* at 454.

231. *Id.* at 451 (emphasis in original).

232. *Id.* at 448–49 (citing Griggs v. Duke Power Co., 401 U.S. at 432).

233. *Id.* at 448–49.

234. *Id.* at 448 (emphasis in original) (footnote omitted). The Court indicated that it might be more willing to support a bottom line focus if § 703(a)(1), *see supra* text accompanying note 94, were the sole protection given to applicants and employees. *Id.* at 448 n.9.

235. *Id.* at 453–55.

mentation of this conception of equality adopts an essential part of the conceptual framework of disparate treatment analysis, while differing in result from the disparate treatment cases.[236] *Teal* differs from the disparate treatment cases because the requirement of validation goes beyond enforcing merely the equal application of employment rules. *Teal* mandates that the rules of job competition be valid—as evidenced by proof of job relatedness[237]—as well as equally applied. As in the disparate treatment cases, however, the majority in *Teal* bases its analysis on a conception of equality of opportunity that is largely divorced from the number of jobs and promotions minorities as a class actually attain. The *Teal* validation requirement, when implemented, will not necessarily generate additional employment benefits for minorities.[238] In sum, the majority rejected the bottom line focus not simply because it preferred, as a matter of policy, that Connecticut rely on validation rather than affirmative action to comply with Title VII. Rather, the majority's result is based on a belief that the bottom line principle is inconsistent with a single, individually-oriented competitive conception of equality that the Court purports to find embodied in Title VII.[239]

The majority's overarching view of Title VII fueled Justice Powell's dissent in *Teal*. The dissenters charged that the majority's repudiation of the bottom line principle was "inconsistent with the very nature of disparate impact claims . . . ."[240] The dissenters did not quarrel with the majority's view that in the long run Title VII is designed to protect individuals, not groups. In their view, however, acceptance of this basic premise did not discredit the bottom line principle.[241] Instead, the dissenters claimed

236. For a discussion of the individual conception of equality enforced through the disparate treatment theory of liability, see *supra* text accompanying notes 114–42.

237. For a discussion of the technique of validation, see *supra* note 11.

238. The *Teal* majority placed considerable emphasis on a notion of equality of individual "opportunity," as evidenced by its use of the word in italicized form eight times. For the majority, equality of employment opportunity was equated with providing an opportunity to compete for employment benefits, rather than in the sense of providing actual employment benefits that would in turn create opportunities to achieve equal economic status. *Teal*, 457 U.S. at 450–51.

239. *Teal*'s endorsement of an individually-oriented conception of equality has subsequently been relied upon to invalidate the use of sex-differentiated mortality tables in determining monthly annuity benefits. Spirt v. Teachers Ins. & Annuity Assoc., 691 F.2d 1054, 1062 (2d Cir. 1982) (appeal pending). The *Spirt* panel viewed *Teal* as consistent with the Supreme Court's decision in City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). *Manhart* invalidated a rule requiring women employees to make larger contributions to an employer-run pension plan. In contrast to *Teal*, both *Spirt* and *Manhart* involved explicit disparate treatment based on sex and no subgroup of women currently benefited from the employer's group focus.

240. *Teal*, 457 U.S. at 456 (Powell, J., dissenting).

241. *Id.* at 458 (Powell, J., dissenting).

that the flaw in the majority's reasoning stemmed from a failure to distinguish the ultimate aims of Title VII from the two legal theories developed to achieve those aims.[242] Disparate impact theory, by definition, focuses on groups and attempts to achieve equality for individual Title VII beneficiaries through enhanced opportunities for the group.[243] The dissenters considered it illogical for the Court to allow plaintiffs to make out a prima facie case by relying on statistics showing group disadvantage and at the same time to ignore bottom line figures which conclusively prove that the alleged group disadvantage does not exist.[244] Justice Powell did not explain, however, precisely how the group focus of disparate impact theory would operate to accomplish the individualistic aim of Title VII, nor why the majority's "conflated" conception of the two legal theories would be less likely to achieve the ultimate statutory aim.[245]

On one level, *Teal* seems merely to have resolved an interesting problem concerning the proper treatment of conflicting sets of statistics relevant to determining adverse impact.[246] Justice Powell's theoretically-oriented dissent indicates, however, that there was more at stake in *Teal*. At the heart of the bottom line issue is a fundamental tension between what at first blush appears to be an individual conception of equality—centered on rationalizing selection procedures—and a group-oriented conception of equality—focused directly on expanding employment opportunities for minorities and women in the relatively short run. *Teal* now is the principal representative of the former, more process-oriented view. On the other hand, the Supreme Court's seminal decision on the compatibility of affirmative action with Title VII, *United Steelworkers of America v. Weber*,[247] although also authored by Justice Brennan, fits more comfortably with the latter group-oriented conception of equality.

Weber involved an unsuccessful "reverse discrimination" challenge to Kaiser Aluminum's craft training program in which 50% of the openings were reserved for blacks until such time as the percentage of black craftworkers approximated the racial composition of the local labor force.[248] Kaiser's voluntary affirm-

242. *Id.*

243. See *supra* text accompanying notes 143–93.

244. *Teal*, 457 U.S. at 459–60.

245. *Id.*

246. In bottom line cases, the immediate problem is to determine whether group adverse impact should be measured at the component stage or at the end of the selection process. See *supra* text accompanying notes 26–29.

247. 443 U.S. 193 (1979).

248. The affirmative action program was instituted pursuant to a collective bargaining agreement between Kaiser and the steelworkers union that covered 15 Kaiser plants. Prior to the establishment of the affirmative action program at the Gramercy,

ative action for black employees was upheld, even though there was no finding of past or present discrimination on the part of Kaiser.[249] The Supreme Court in *Weber* interpreted Title VII as encouraging race conscious employer efforts designed to achieve concrete results in the form of expanded job opportunities for the minority group. The Court justified its result-oriented approach by characterizing the goal of the 1964 Civil Rights Act as "the integration of blacks into the mainstream of American society"[250] and noting that the 88th Congress believed that securing a job with "a future"[251] was a key to such integration. For the *Weber* Court, equality of employment opportunity was directly related to the expansion of jobs and other concrete employment benefits for minorities. Such increased employment benefits would provide minorities with a realistic opportunity for a more deeply rooted integration into society.[252] The Court also regarded voluntary affirmative action as desirable because it accomplished the statute's economic objectives while leaving "management prerogatives and union freedoms . . . undisturbed to the greatest extent possible."[253]

Louisiana, plant involved in the *Weber* case, only 1.83% of the skilled craftworkers were black, as compared to the local labor force, which was 39% black. The conspicuous racial imbalance was due principally to Kaiser's prior policy of hiring only experienced craftworkers. Because the local unions had formerly excluded blacks, few were able to gain the requisite experience. *Id.* at 197–99.

249. *Id.* at 199–200. It would be somewhat misleading, however, to characterize all of Kaiser's actions relating to affirmative action as completely voluntary. In 1969, as a result of informal pressure from the Office of Federal Contract Compliance Programs of the Department of Labor, Kaiser began to hire blacks as unskilled workers at the rate of one black for each white worker hired. Blumrosen, *Affirmative Action*, *supra* note 19, at 6 n.12. In 1974, Kaiser selected employees within the plant for its affirmative action training program for skilled workers. The selection was based on race in order to maintain a 50/50 ratio of black to white trainees. The selection was also based on seniority, calculated separately for the two racial groups. *Id.* at 6. Because most of the black incumbents chosen for the training program were hired after 1969, they had much less seniority than the whites chosen for the program. This affirmative action plan was modeled on the settlement of employment discrimination claims in the steel industry. *Id.* at 6 n.13; *see* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975). Thus, the affirmative action plan was in part generated by the efforts of the federal government and by the Title VII experience in a related industry.

250. *Weber*, 443 U.S. at 202.

251. *Id.* at 202–03.

252. *See id.*

253. *Id.* at 206 (quoting H.R. REP. No. 914, 88th Cong., 1st Sess. 29 (1963)). The Court had previously recognized the value of voluntary employer action in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), when it declared that one purpose served by back pay awards in Title VII cases was "prophylactic." Such awards, the Court believed, would provide the "spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Id.* at 417–18, *quoting* United States v. N.L. Indus., Inc., 479

Proponents of the bottom line principle could gain considerable sustenance from *Weber*'s strong endorsement of affirmative action and its consequent bolstering of management prerogative to select methods for increasing employment opportunities for minorities.[254] As a matter of principle and policy, *Weber*'s endorsement of voluntary affirmative action fits with the bottom line focus. An employer who provides at least a proportionate number of employment benefits for blacks may be said to have contributed to Title VII's objective of expanding employment opportunities for minorities, despite the use of a selection device that ordinarily would have a tendency to select in a discriminatory pattern. Additionally, the bottom line principle reinforces management prerogative by permitting the employer to decide the best way to achieve the goal of equal opportunity without sacrificing other imperatives of the business. For the employer, the bottom line focus provides an alternative to validating individual selection components and thus may limit the necessity for government intrusion to enforce equality rights for Title VII beneficiaries.

Weber was not discussed by the Court in *Teal*.[255] The majority may have believed, however, that one critical distinction overshadowed any theoretical and practical kinship between *Weber* and the bottom line defense proposed in *Teal*. The key difference between *Weber* and the bottom line issue in *Teal* is that the affirmative action program in *Teal* failed to promote the interests of a certain subclass of blacks. The defendant in *Teal* selected only blacks who passed the initial written examination without adequately justifying the criteria by which this subgroup was selected. The challenge in *Weber*, in contrast, was pressed by a white employee and did not seem to present a significant potential for harming a subclass of blacks.[256]

F.2d 354, 379 (8th Cir. 1973); *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected as the preferred means of achieving the goals of Title VII."); Smith v. United Bhd. of Carpenters, 685 F.2d 164, 169 (6th Cir. 1982); Stotts v. Memphis Fire Dep't, 679 F.2d 541, 554 (6th Cir. 1982) ("a principal purpose of Title VII is to induce voluntary race-conscious affirmative action").

254. *See, e.g.*, Blumrosen, *Affirmative Action*, *supra* note 19, at 45; Brief for the United States as Amicus Curiae at 13, Connecticut v. Teal, 457 U.S. 440 (1982).

255. The State of Connecticut and the United States had, however, cited *Weber* in brief in support of the bottom line focus. Brief for Petitioner at 15–16, Connecticut v. Teal, 457 U.S. 440 (1982); Brief for the United States as Amicus Curiae at 13, Connecticut v. Teal, 457 U.S. 440 (1982).

256. The Kaiser affirmative action plan promised to afford a substantial percentage of black employees the opportunity to become skilled workers. The selections for the trainees were made from incumbent unskilled workers at the Gramercy plant, approximately 15% of whom were black. Blumrosen, *Affirmative Action*, *supra* note 19, at 6. Under the affirmative action plan, trainees were selected at the rate of at least one black for every white until the percentage of black skilled workers was equal

When thus placed alongside *Weber*, the most problematic aspect of *Teal* lies in the Court's willingness to accord controlling weight to the interests of individual minority workers, even at the cost of reducing employer incentive to adopt voluntary affirmative action plans that would benefit the entire group. When the interest of individual white male workers is pitted against affirmative action, *Weber* tips the balance in favor of the minority group interest and simultaneously reinforces management discretion to choose between validation and affirmative action to achieve employment equality.[257]

The Court's decision in *Teal* to subordinate affirmative action to the interests of individual minority group members weakens the incentive for employers like Kaiser to opt for affirmative action as the means to achieve employment equality. After *Teal*, affirmative action, even if successful, may not immunize the employer from disparate impact liability under Title VII. Validation is now the only compliance technique which, theoretically at least, insulates the employer from Title VII disparate impact liability in dealing with all groups, whites as well as minorities.[258]

Teal poses an irony for those who regard affirmative action as the preferred means of achieving the equality of employment opportunity described in *Weber*. As a compliance technique, validation, at best, assures only that the process for selecting employees will be geared toward "merit." Particularly in the short run, validation may actually operate to the economic disadvantage of mi-

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to the percentage of blacks in the local labor force (approximately 39%). 443 U.S. at 8–99. The comparatively high percentage of blacks needed to meet the 50/50 ratio requirement under the apprenticeship program thus diminished the chance that a significant number of incumbent black employees would be unable to take advantage of the affirmative action plan.

257. The majority in *Weber* did indicate, however, that employers were not free to choose any conceivable form of affirmative action. Although not purporting to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," the Court noted that the Kaiser plan was acceptable because it: (a) was "designed to break down old patterns of racial segregation and hierarchy;" (b) did not "unnecessarily trammel the interests of white employees;" (c) did not create "an absolute bar to advancement of white employees;" and (d) was a "temporary measure" not "intended to maintain a racial balance." 443 U.S. at 208–09. Some affirmative action plans have failed the *Weber* standards. *E.g.*, Kromnick v. School Dist., 555 F. Supp. 249 (E.D. Pa. 1983) (quota used solely to *maintain* existing racial balance held invalid); Jurgens v. Thomas, 29 FAIR EMPL. PRAC. CAS. (BNA) 1561, 1581 (N.D. Tex. 1982) (affirmative action plans held invalid because the employer, the Equal Employment Opportunity Commission, had no history of discrimination and no statistical disparity existed between the employer's work force and the available labor force); Lehman v. Yellow Freight System, 26 FAIR EMPL. PRAC. CAS. (BNA) 75, 81–82 (7th Cir. 1981) (informal decision to favor black applicant held invalid because the employer was not attempting to remedy a statistical disparity between representation of blacks in the labor force and employer's workforce, and plan could not be considered a temporary measure).

258. *See supra* text accompanying notes 231–32.

norities[259]—a consequence not generally associated with affirmative action. The "liberal" majority supported affirmative action in *Weber* in order to advance the economic status of blacks, yet was unwilling to create further incentives to such voluntary affirmative efforts in *Teal*. Instead, it insisted on validation, regardless of the offsetting results attributable to the employer's affirmative action program.

It thus seems fair to draw one of two conclusions from *Teal*. It is possible that the "liberal" majority did not believe that a preference for validation would, in the long run, operate to disadvantage the economic interests of protected groups. Alternatively, the majority may have concluded that such disadvantage is the cost of remaining faithful to the balance between equality interests and business needs envisioned in Title VII. To assess whether this preference for validation over affirmative action is supported by the theory or policies behind Title VII, it is useful first to consider the reach of the majority's holding in *Teal*[260] and then to examine the principal theoretical[261] and policy[262] arguments that surround the bottom line debate.

B. *Title VII's Objectives and the Demise of the Bottom Line*

1. The Reach of the *Teal* Requirement of Validation

Although the *Teal* majority fundamentally disagreed with the bottom line principle in theory, it limited its holding to cases in which the challenged selection component operates as a pass/fail barrier to employment, rather than simply as a portion of a cumulative selection process.[263] The plaintiffs in *Teal* who failed the unvalidated test were automatically eliminated from the pool of those eligible for promotion at that early stage.[264] The Court carefully avoided expressing any opinion regarding the legality of a selection process in which an unvalidated test operates as only one of several selection measures and the applicant is not required to pass the one test in order to be selected.[265]

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259. *See, e.g.*, Fiss, *supra* note 60, at 238–39; Lerner, *supra* note 11, at 41; Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 CATH. U.L. REV. 605, 630–33 (1979).

260. *See infra* text accompanying notes 263–74.

261. *See infra* text accompanying notes 275–313.

262. *See infra* text accompanying notes 314–47.

263. *Teal*, 457 U.S. at 445, 452.

264. *Id.* at 442–44. *See supra* text accompanying notes 29–37.

265. Justice Powell's dissent interpreted the majority's ruling as governing only pass/fail barriers and suggested that employers could easily circumvent the ruling by using a cumulative selection process in which applicants were allowed to compete at all stages of the process:

> [E]mployers may integrate consideration of test results into one overall hiring decision based on that "factor" *and* additional factors. Such a

By so limiting its holding in *Teal*, the Court may have tacitly accepted the position of the Second Circuit that drew a sharp distinction between pass/fail barriers and other less preclusive selection obstacles.[266] Echoing Justice Powell's famous opinion in *Board of Regents v. Bakke*,[267] the Second Circuit had stressed that its holding in *Teal* did not conflict with other lower court holdings refusing to permit *Griggs*-based challenges to a mere component or subtest that constituted only a portion of a cumulative selection procedure.[268] The Second Circuit distinguished those instances in which an offsetting factor—most often an affirmative action plan—is applied to all the candidates and not simply to a separate class of applicants who survive an initial pass/fail barrier. In such cases, the Second Circuit would not regard the emphasis on bottom line results as unfair because all minority applicants have had a chance to benefit from the affirmative action plan.[269]

The Second Circuit's reasoning is certainly compatible with the narrow holding of the Supreme Court in *Teal*. However, because the Supreme Court failed to decide the issue expressly, the question of the proper reach of *Teal* will continue to plague the lower courts. Moreover, upon closer analysis of the problem, it indeed appears likely that *Teal* may not be restricted only to pass/fail barriers. Rather, as explained below, the more persuasive position is that the *Teal* validation requirement should apply to all significant components of a selection procedure, whether or not they operate as pass/fail barriers to selection.[270]

In one respect at least, some limited adherence to a bottom line approach is unavoidable. No court would require each and every component of a selection procedure including, for example, individual test questions, to be scrutinized separately for disparate

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> process would not, even under the Court's reasoning, result in a finding of discrimination on the basis of disparate impact unless the actual hiring decisions had a disparate impact on the minority group.

Id. at 463–64 n.8.

266. Teal v. Connecticut, 645 F.2d 133, 138–39 (2d Cir. 1981), *aff'd sub nom.*, 457 U.S. 440 (1982).

267. 438 U.S. 265, 315–20 (1978).

268. Kirkland v. New York State Dep't of Correctional Services, 374 F. Supp. 1361, 1370 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); Smith v. Troyan, 520 F.2d 492, 498 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976).

269. *Teal*, 645 F.2d at 138–39. The Court of Appeals also argued that, in contrast to a cumulative selection process setting, it saw little justification for a court to refuse to review the isolated effects of a pass/fail component because both the component and the affected individuals are "readily identifiable." *Id.* at 139.

270. Pre-*Teal* lower court decisions on both sides of the bottom line controversy have expressed disapproval of drawing the line at pass/fail barriers. *See, e.g.*, Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1262 (D. Conn. 1979) (approving bottom line principle); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 895 (C.D. Cal. 1976) (rejecting the bottom line principle).

impact.[271] Judicial efficiency demands the imposition of some reasonable limitation on the kind of components that may be challenged. Beyond that limitation, however, considerations of judicial management of Title VII cases do little to dictate the extent to which a bottom line focus must be employed.

Drawing a line between a component that is simply cumulative and one that operates as a barrier to further consideration is conceptually unsound.[272] To a disappointed applicant, falling just shy of the acceptable grade on a test that constitutes an important, but not preclusive, portion of the selection process has the same practical effect as not making it through a pass/fail screening device consisting solely of a test. Moreover, if the candidate's rejection is arguably related to race-linked qualification, there is no logic to predicating liability solely on the place the component occupies in the selection process.

Limiting challenges to pass/fail barriers may be an efficient judicial management tool to confine attacks on employment procedures. Such restriction, however, cannot be justified on any other principle. Although the use of selection components that do not amount to pass/fail barriers may seem fairer at first glance, because they do not create readily identifiable subcategories of minority candidates, the distinction is primarily cosmetic.

For example, suppose an employer uses both a written test and a scored interview—neither of which has been validated—as the bases for its hiring decisions. If the test has a disproportionate impact on blacks, the employer might decide to offset the adverse impact by incorporating affirmative action into the interview component of the process and systematically giving higher ratings to

271. *See* Smith v. Troyan, 520 F.2d 492, 498 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1262 (D. Conn. 1975); Kirkland v. New York State Dep't of Correctional Services, 374 F. Supp. 1361, 1370 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

272. In constitutional challenges to admissions procedures of educational institutions, similar arguments have been made regarding the conceptual unsoundness of differentiating between an affirmative action quota and a less stark form of affirmative action whereby minority applicants are simply afforded a "plus" based on their race. *See, e.g.*, R. Dworkin, *Why Bakke Has No Case*, NEW YORK REVIEW OF BOOKS, Nov. 10, 1977, at 11 (Affirmative action quota program, challenged in *Bakke*, is in principle no different than plans that merely permit a candidate's race to count affirmatively in the admissions process); Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 28 (1979) (affording a "plus" to a minority applicant can operate as a decisive factor "blurring the borders of preference" yet maintaining intact its racial substance); Voros, *Three Views of Equal Protection: A Backdrop to Bakke*, 1979 B.Y.U. L. REV. 25, 72 (the inescapable result of the admission of a minority student when the "plus" makes the difference is the exclusion of a non-minority applicant on a purely racial basis). *See also* Justice Brennan's opinion in *Bakke*, 438 U.S. at 378.

black interviewees. Such an affirmative action plan could be implemented in at least two ways. Using one approach, the employer might decide that passing the written test will be a prerequisite or pass/fail barrier to obtaining an interview. In order to obtain a representative number of blacks and to counteract the adverse impact of the test, the employer might then select a disproportionately high number of blacks from those who pass the test and are granted an interview. Under this system, black candidates who failed the test would have no chance to make it up on the interview and would be ineligible for inclusion in the affirmative action pool. Alternatively, the employer might choose to help black candidates by giving them higher ratings on the interview, but to interview all those applying and then weigh the test and interview equally. Under this alternative, a black applicant who scored very low on the test thus might still have a chance of being hired by achieving a very high score on the interview.

In the latter cumulative component case, the black applicant who, for all practical purposes, "fails" the test may feel less the victim of an unfair hiring process than the black who failed the test under the pass/fail system. Under the cumulative system, the applicant has a chance to make up the negative impact of one unvalidated procedure by scoring well on another unvalidated device. In both cases, however, the employer has in fact created a preferred subclass of blacks without justifying the criterion for selection. In the pass/fail situation, the preferred subclass is limited to blacks who pass the test; in the cumulative component setting, the preferred subclass consists of blacks who do well on the exam or who score very high on the interview. In each, there will be blacks who are excluded because they do not fall into what is an arguably unjustifiable preferred subclass. Assuming that both the test and the interview are not job-related—recall that neither component has been validated—it is no fairer in principle to exclude a potentially qualified individual from a job based on two suspect hiring measures rather than merely on one.

Once the legitimacy, in principle, of permitting challenges to merely cumulative components of a selection process is acknowledged, it is difficult to see how concerns of judicial administration alone justify limiting scrutiny to pass/fail barriers. Instead, all significant components of a testing procedure, whether labeled subtests or not, should be vulnerable to a disparate impact challenge. This vulnerability to challenge should be subject only to the limitation that courts will not waste their time passing judgment on insignificant aspects of the total process.[273] Analyzing

273. In addition to the unsoundness of drawing a distinction between pass/fail barriers and cumulative components as a matter of principle, there may be practical

the theoretical and practical soundness of *Teal*'s validation requirement, therefore, is all the more imperative because *Teal*'s holding is relevant in principle to all disparate impact challenges to employee selection devices.[274]

2. Validation and Disparate Impact Theory

As discussed above,[275] the *Teal* majority justified its rejection of the bottom line principle by resort to an individually-oriented conception of equality. In the majority view, only by requiring the validation of isolated selection devices that possess the tendency to select in a discriminatory manner could the courts enforce Title VII's guarantee of equal opportunity for individuals.[276] In addition to associating the validation requirement with equal opportunity and individual rights, the majority opinion rhetorically aligned the bottom line focus to a quota-like defense that might place a ceiling on employment opportunities for blacks. The majority suspected that the bottom line principle could unjustifiably serve to insulate from liability those employers who discriminate against some blacks and then try to justify their actions

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reasons for *preferring* pass/fail barriers as the more efficient affirmative action tool. The employer who uses a test as a pass/fail screening device for the interview may fairly readily calculate how many of the minorities who passed the test must be hired to obtain its overall goal. In contrast, the employer whose affirmative action "plus" is potentially available to all minority candidates by use of a cumulative process may well have to wait until the end of a lengthy and costly interview process to determine which minority members will be the beneficiaries of affirmative action or risk racial imbalance in its overall hiring result. The more stark, separate track form of affirmative action thus may serve the employer's desire for an efficient system that guarantees results. *See* Brief of the National League of Cities and the National Public Employer Labor Relations Association as Amicus Curiae in Support of Petitioners at 27–28, Connecticut v. Teal, 457 U.S. 440 (1982).

274. Two post-*Teal* cases have raised the question of whether the *Teal* validation requirement should govern challenges to selection criteria applied to an all-female applicant pool. These cases most dramatically pose the question of whether the right embraced in *Teal* should be viewed as a process-oriented right of fair procedures, regardless of the preordained outcome. In *Costa v. Markey*, 706 F.2d 1 (1st Cir. 1983), the en banc court held *Teal* inapplicable and refused to require validation of a minimum height requirement. The height requirement was used in a round of hiring decisions designed to select a female police officer needed to perform special duties related to female prisoners. Reversing the panel decision, 694 F.2d 876 (1st Cir. 1982), the court reasoned that *Teal* should not control unless there was competition between men and women for the desired job benefit. *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. dismissed*, 103 S. Ct. 1534 (1983), dealt with the application of a weight requirement as a condition of employment for flight hostesses, a position held only by women. *Id.* at 603. The majority did not reach the question of the applicability of *Teal* but invalidated the requirement as a form of intentional disparate treatment. *Id.* at 605. The dissent argued that *Teal* was inapplicable in the single sex job context. *Id.* at 611–12 (9th Cir. 1982) (Farris, J., dissenting).

275. *See supra* text accompanying notes 229–39.

276. 457 U.S. at 453–56.

by pointing to the more favorable treatment of other blacks.[277]

Undoubtedly, the most devastating charge that may be levied against the bottom line principle[278] is that it reflects a rigid conception of equality that rests solely on results as measured by the number of employment benefits secured by minority groups. From *Griggs* onward, the Court has maintained that Title VII was not designed to force an equality of group representation in the workplace.[279] Instead, the Court in Title VII cases purportedly enforces the more neutral view, first articulated in *Griggs*, that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[280]

The cases seem to endorse the "merit" ideal under which every individual has an equal opportunity to compete for employment benefits based on qualifications and is not guaranteed a job simply because of race or sex.[281] Furthermore, as noted earlier,[282] the legislative history of the Act provides some support for this neutral, merit-based view in statements that the merit system is

277. Connecticut v. Teal, 457 U.S. 440, 455–56 (1982). This fear of abuse of the bottom line principle by ill-intentioned employers was echoed in the amicus brief of the Lawyers' Committee for Civil Rights Under Law. Amicus suggested that the rationale of the bottom line principle might insulate an employer who hires only light-skinned blacks, excluding dark-skinned blacks, provided that a sufficient number of blacks are hired. Presaging the sentiment of the majority, amicus contended that no distinction should be drawn between the employer who purposefully discriminates on the basis of race and tries to shield itself by pointing to favorably balanced overall results and the well-intentioned employer who engages in affirmative action to offset the adverse effects of an unvalidated selection device. Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae in Support of Respondents at 9–10, Connecticut v. Teal, 457 U.S. 440 (1982).

278. For a discussion of two possible advantages of rejecting the bottom line principle, see *infra* notes 314–15 and accompanying text.

279. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 453–54 (1982); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Furnco Constr. Co. v. Waters, 438 U.S. 567, 579 (1978); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 709 (1978); McDonnell Douglas v. Green, 411 U.S. 792, 800-01 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

280. *Griggs*, 401 U.S. at 431 (1971).

281. Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971); Connecticut v. Teal, 457 U.S. 440, 451 (1982); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579–80 (1978); Dothard v. Rawlinson, 433 U.S. 321, 331 (1977); McDonnell Douglas v. Green, 411 U.S. 792, 800–04 (1973); International Bhd. of Teamsters v. United States, 431 U.S. 324, 348–49 & n.31 (1977).

The concept or principle of merit, like the concept of equality, has been described as an "essentially contestable concept" that is capable of supporting a variety of conceptions, depending on the particular function served by the principle. *See* Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815, 825–29 (1980). Fallon provides a helpful working definition of merit as "any quality or achievement, typically regarded as an indication of excellence, that makes fitting the bestowal of some desired benefit or reward." *Id.* at 815 n.1.

282. *See supra* text accompanying notes 100–03.

good for business as well as protective of minority interests.[283] In this view, reliance on merit protects business from the inefficiency and stagnation attributable to a rigid quota system, which arguably would tend to discourage workers from striving for advancement through increased productivity.[284]

This general acceptance of a merit system and correlative disapproval of a legally mandated quota system, however, cannot be simplistically translated into a persuasive argument against either the bottom line principle or other result-oriented compliance techniques such as voluntary affirmative action. Congress expressly incorporated its dislike for quotas in only one narrow provision of Title VII. The prohibition of Section 703(j) serves only to prevent employers from being compelled to give preferential treatment to any individual or group solely on account of a racial imbalance in the work force.[285] The prohibition by no means reaches the use of quotas for all purposes.[286] Indeed, judicially imposed quotas designed to remedy unlawful discrimination[287] and affirmative ac-

283. *See, e.g.*, 110 CONG. REC. 13088, *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 3107 (comments of Senator Humphrey).

284. For a thoughtful view of the merit principle as justified only by considerations of efficiency or productivity, and not for moral notions of desert, see Daniels, *Merit and Meritocracy*, 7 PHIL. & PUB. AFF. 207 (1978). *See also* Fallon, *supra* note 281, at 838; Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 961–62 (1974); *Oversight Hearings on Equal Employment Opportunity and Affirmative Action, Pt. 1, Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 1st Sess. 472–78 (1981) (statement of Joe R. Feagin, Ph.D., Professor of Sociology, University of Texas) (arguing that affirmative action efforts do not destroy normal meritocratic procedures in organizations).

285. Section 703(j) provides in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1981).

286. For a discussion of the legislative history surrounding the issues of preferential treatment and quotas of Section 703(j), see Blumrosen, *The Group Interest Concept, supra* note 5, at 126–31.

287. *See, e.g.*, United States v. City of Chicago, 549 F.2d 415, 436–37 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), *remedial order reconsidered and aff'd*, 631 F.2d 469 (7th Cir. 1980); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340–41 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1026–28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); NAACP v. Allen, 493 F.2d 614, 619–21 (5th Cir. 1974); Castro v. Beecher, 459 F.2d 725, 737 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 315, 330–31 (8th Cir. 1971), *modified en banc*, 452 F.2d 327 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

tion quotas voluntarily instituted by employers to serve as insulation from possible Title VII liability[288] are commonplace and have generally fared well under attack in litigation.

Significantly, *Teal*'s rejection of the bottom line principle does not signal a general disapproval of using result-oriented techniques to achieve Title VII compliance. Justice Brennan's opinion did not denigrate the desirability of affirmative action quotas or characterize the bottom line principle in such stridently disparaging terms as to call into question the propriety of using result-oriented techniques in other settings. Instead, Brennan discredited the bottom line principle in *Teal* by a judicial insistence on tying only validation, and not the bottom line principle, to the equality of individual opportunity purportedly guaranteed by *Griggs* and the subsequent line of disparate impact cases.[289]

The bottom line principle admittedly tends to promote affirmative action efforts that focus primarily on the relative status of the group rather than solely on the qualifications of an individual.[290] Nor is it inconceivable that the bottom line in some cases might provide a haven for the discriminatory employer who seeks to hide behind hiring or promotion statistics to limit further opportunities for blacks.[291] But a strong *theoretical* argument

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288. *See, e.g.*, Setser v. Novack Investment Co., 657 F.2d 962, 968–70 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981); Local Union No. 35 of Int'l Bhd. of Elec. Workers v. City of Hartford, 625 F.2d 416, 424–25 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); Baker v. City of Detroit, 483 F. Supp. 930, 491–94 (E.D. Mich. 1979); Van Aken v. Young, 29 EMP. PRAC. DEC. (CCH) ¶ 32,902 (E.D. Mich. 1982); Price v. Civil Serv. Comm'n, 26 Cal. 3d 257, 273–76, 161 Cal. Rptr. 475, 485–87, 604 P.2d 1365, 1374–76 (1980), *cert. dismissed as moot*, 449 U.S. 811 (1980); Chmill v. City of Pittsburgh, 488 Pa. 470, 483–91, 412 A.2d 860, 867–71 (1980); Maehren v. City of Seattle, 92 Wash. 2d 480, 490, 599 P.2d 1255, 1261 (1979) (en banc), *cert. denied*, 452 U.S. 938 (1981). For cases upholding consent decrees embodying preferential remedies, *see also* EEOC v. AT & T Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); EEOC v. Contour Chair Lounge Co., 596 F.2d 809 (8th Cir. 1979) (upholding a conciliation agreement); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); United States v. City of Miami, 614 F.2d 1322, *aff'd in part, vacated and remanded in part, on rehearing*, 664 F.2d 435 (5th Cir. 1981).

289. The *Teal* majority insisted that the focus of the major post-*Griggs* impact cases had been on the potential of the selection device to pose a barrier to employment opportunity, rather than on the bottom line results. 457 U.S. at 450 (citing Dothard v. Rawlinson, 433 U.S. 321, 329–30 & n.12 (1977), Albemarle Paper Co. v. Moody, 422 U.S. 405, 436 (1975), and New York Transit Authority v. Beazer, 440 U.S. 568, 584 (1979)). Justice Powell, in his dissent, countered by noting that none of the cases relied on by the Court posed the question of whether balanced bottom line results should insulate employers from Title VII liability. The dissent cited language in *Dothard* and *Beazer* suggesting that the bottom line focus was legally sound. 457 U.S. at 460–61 & n.6 (Powell, J., dissenting).

290. For a discussion of the operation of the bottom line principle, see *supra* text accompanying notes 26–29.

291. *See supra* note 277. It is now well settled, however, that a disparate treatment

against rejecting the bottom line approach to Title VII enforcement still exists: the principle is no more group-focused, no more result-oriented, and no more destructive of the merit system than disparate impact theory itself, which is the source of the validation requirement imposed by *Teal*. Both validation and the bottom line focus are approaches that reach beyond a concern for fair competition between individuals and operate to remedy group inequities.[292] Once the theoretical objections to the bottom line are thus neutralized, the debate over the principle can be more productively centered on its ramifications in practice.

Any formulation of disparate impact theory, once divorced from a finding of intentional disparate treatment of individual Title VII claimants, is fundamentally result-oriented and grounded on a notion of group status. *Griggs* established that selection devices which tend to pose a barrier to advancement for blacks must be justified.[293] The notion of what constitutes a barrier is defined in terms of the adverse effect it has on the group.[294] Hence, it is impossible for an individual minority worker to establish adverse impact without some evidence of the effect of the selection device on persons other than the individual plaintiff.[295] The requirement of validation in *Teal* remains inextricably tied to a prerequisite showing of group adverse impact. Regardless of how unfair or unrelated to the job the selection process may be, the individual plaintiff, even if a member of a minority group, cannot secure relief unless the unfairness may be said to exaggerate or recreate race-based inequities that have disadvantaged the plaintiff's racial group.[296]

For example, suppose a municipal police department uses an unvalidated physical fitness test to screen applicants. An individual black male candidate who fails the test will not benefit from Title VII unless he can show that blacks generally score less well than whites on this measure—a difficult, if not impossible, task because there is no evidence that physical fitness tests have an ad-

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challenge is available against an employer who acts with discriminatory intent, regardless of the presence of a balanced work force. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (*per curiam*). Thus, the danger that the bottom line principle would shield the ill-intentioned employer stems not from the unavailability of a legal remedy but rather from the difficulty of proving discriminatory intent. For a general discussion of the difficulties of proving discriminatory intent, see Bartholet, *Proof of Discriminatory Intent Under Title VII:* United States Postal Service Board of Governors v. Aikens, 70 CALIF. L. REV. 1201 (1982).

292. *See supra* text accompanying notes 13–16, 72–75, 240–45.

293. Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971).

294. See *supra* note 12 for a description of the measurement of adverse impact.

295. *See* cases cited *supra* note 139.

296. *See supra* text accompanying notes 143–93.

verse impact on blacks. The black applicant may justifiably believe that he has not been given a fair opportunity to secure a job in a field traditionally dominated by whites because the rules of the competition have not been shown to be fair, that is, job-related. For this individual, however, Title VII's guarantee of equal opportunity will provide no remedy because, without a showing of race-based inequality, as measured by group-oriented statistics, the individual's claim of unfairness is not encompassed within Title VII's limited antidiscrimination mandate. Because Title VII is not a comprehensive fair employment law, it provides no solace for an unselected individual unless the harm to the individual can be traced either to intentional discrimination or group inequity.

The majority in *Teal* recognized and approved of the group focus of disparate impact theory.[297] Nevertheless, the Court sought to refine the focus by articulating the equality right secured thereby as the right to have "the *opportunity* to compete equally with white workers on the basis of job-related criteria."[298] By defining the immediate goal vindicated by disparate impact theory as fair competition under fair rules, the Court sounds as if it has succeeded in removing any trace of preference, quota, or other result-oriented techniques from its legal theory.

Yet the Court's neutral-sounding articulation of the goal secured by impact analysis may be misleading, because it tends to obscure any cogent explanation of how impact theory has operated to promote equality. At the outset, it must be noted that only minority members and women have been considered entitled to secure benefits by using disparate impact analysis.[299] Title VII has not been "neutralized" by allowing white males to rely on disparate impact theory to establish a prima facie case of discrimination.[300] Instead, the only protection traditionally afforded white

297. *Teal*, 457 U.S. at 448–49.

298. *Id.* at 451 (emphasis in original).

299. *E.g.* the Supreme Court disparate impact cases have all dealt with claims of minorities, see *supra* note 72, except for *Dothard v. Rawlinson*, 433 U.S. 321 (1977), which struck down height and weight requirements that had a discriminatory impact upon women.

300. The Supreme Court has implied that disparate impact analysis may not be invoked by white males. *See* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). *Manhart* held that a requirement that female employees make larger contributions to a pension fund than male employees violated Title VII's ban against disparate treatment. The Court rejected the employer's claim that to equalize contributions would place a disproportionately heavy burden on male employees who, as a group, had a shorter life expectancy:

> Even under Title VII itself—assuming disparate-impact analysis applies to fringe benefits, *cf. Nashville Gas Co. v. Satty*, 434 U.S. 136, 144–45—the male employees would not prevail. Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never

males by Title VII is in cases in which there is proof of intentional disparate treatment.[301]

Reserving disparate impact theory to the so-called protected groups under Title VII makes sense in light of the ultimate goals of the legislation. Congress in 1964 was concerned with improving the economic status of blacks and sought to halt the system-wide discrimination which historically had relegated blacks to a position of economic inferiority.[302] This Congressional objective has not yet been achieved. Many social indicators demonstrate that compared to white males, women and minority males have not achieved "equality of opportunity and equity of reward."[303] As compared to white males, minorities are more likely to be educationally overqualified for the work they do,[304] earning less than

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held, that discrimination must always be inferred from such consequences.

Id. at 710 n.20.

The United States Commission on Civil Rights also takes the position that disparate impact analysis should be limited to challenges brought by minorities or women:

> Founded as it is on the historical and current process of discrimination against minorities and women, the *Griggs* principle cannot sensibly be applied to white males. There is no history of discrimination against white males because of the color of their skin or their gender, no interacting individual, organizational, and structural attitudes and actions denying white males opportunities that disadvantage them in the job market on account of their race and/or sex.

UNITED STATES COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980S: DISMANTLING THE PROCESS OF DISCRIMINATION at 17 n.20 (1981) [hereinafter cited as U.S. COMM'N ON CIVIL RIGHTS]. *See also* Blumrosen, *Affirmative Action*, *supra* note 19, at 43.

But see Weisbord v. Michigan State Univ., 495 F. Supp. 1347 (W.D. Mich. 1980). Without providing reasons, the *Weisbord* Court refused to dismiss a suit brought by a white male who invoked disparate impact theory: "Viewing the pleadings liberally the Court can not say for a certainty that plaintiff has not stated a prima facie claim under *Griggs*." *Id.* at 1352.

301. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282–83 (1976) (white male employees who misappropriated cargo and were discharged, while a black male employee, also involved in the theft, was retained, have a cause of action under Title VII); Calcote v. Texas Educ. Found., Inc., 458 F. Supp. 231, 236 (W.D. Tex. 1976), *aff'd*, 578 F.2d 95 (5th Cir. 1978) (white male was paid a lower salary, received smaller salary increases than an equally qualified black male and was harassed because of his race); Sawyer v. Russo, 19 EMPL. PRAC. DEC. (CCH) ¶ 8996 (D.D.C. 1979) (black supervisors violated regulations by passing over qualified white male for promotion in favor of lesser-qualified black applicants), *cited in* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 300, at 17 n.20. The Commission noted, however, that the above disparate treatment cases represent discrimination that is "isolated and not part of a self-perpetuating process of discrimination such as that experienced by minorities and women." *Id.*

302. *See supra* text accompanying notes 104–07.

303. UNITED STATES COMM'N ON CIVIL RIGHTS, SOCIAL INDICATORS OF EQUALITY FOR MINORITIES AND WOMEN 86 (1978).

304. "[B]lack males with a high school education are about 50% more likely to be overqualified for their occupations than majority males." *Id.* at 17.

comparably educated majority males,[305] unemployed,[306] experiencing smaller annual increases in earnings with age,[307] living in poverty,[308] and living in overcrowded conditions.[309]

White males, both historically and at present, have not been victimized on the basis of group characteristics. There is thus little need to use disparate impact theory on their behalf to dismantle neutral policies in order to provide more opportunities for the relatively favored group. Only very rarely do facially neutral standards have a tendency to favor blacks over whites. The only neutral policy with such an effect that has surfaced in the caselaw is the use of a veterans preference as a selection device.[310] Understandably, then, when Congress sought to eliminate barriers to blacks in 1964, there was no similar concern for removing neutral barriers whose only tendency was to hurt whites. Even if such barriers existed, it is unlikely that Congress would have regarded these devices as part of the same problem with which it was struggling: to frame a law that would end the massive, systemic discrimination suffered by blacks.

In sum, disparate impact analysis has been inherently one-sided. Blacks and women may object to a test that tends to reduce job opportunities for them. However, at least before *Teal*, a white male could not successfully object under Title VII to a neutral but non-job-related device that tended to favor blacks or women.

Once the one-sided nature of disparate impact theory is acknowledged, the fair competition that *Teal* supposedly heralds is placed in a different light. White employees are not protected unless blacks choose to assert their rights to challenge unvalidated selection devices that have an adverse impact on blacks, thereby incidentally rationalizing the employment processes for all workers. In this one respect at least, reserving the protection of dispa-

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305. For most college-educated males belonging to minority groups, earnings were less than 85% of those of white males in 1975. Black females fared even worse than black males. *Id.* at 22–23.

306. Between 1970 and 1976, a period of rising unemployment, the unemployment of minorities and women worsened in absolute terms as well as in relation to majority males. Over this six year period, the unemployment rate for blacks of both sexes increased from almost twice to close to three times the unemployment rate of white males. *Id.* at 29.

307. The average annual dollar increments for black males was less than half that of white males in 1976. Black females fared even worse. *Id.* at 56–60.

308. Black families were over three times as likely to be living in poverty as white families in 1975. *Id.* at 65.

309. "In many of the groups of minority- and female-headed households, overcrowding occurs two to three times more frequently as in majority-headed households." *Id.* at 79.

310. Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973), *aff'd in part, rev'd in part*, Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976). See *infra* text accompanying notes 330–31.

rate impact theory only for minority persons must continue to function as a kind of preference, albeit a justified preference, given the disparity of condition of minorities in the workplace.[311]

It is probable that the courts, in an effort to reduce the intrusion on employer discretion, will continue to limit disparate impact challenges to those brought by minorities.[312] Whenever neutral policies are vulnerable to legal challenge, managerial discretion to choose the policies it determines to be most competitively viable is thereby hampered. To keep this intrusion to a minimum, Congress chose not to enact a fair employment law which allowed all individual workers to compete with each other on the basis of job related tests.[313] Instead, Congress chose to focus on the most persuasive justification for authorizing judicial reassessment of the fairness of neutral business practices—the unequal group status of minorities in the workplace that is the legacy of past discrimination.

Disparate impact theory is clearly closely associated with bettering the condition of traditionally disadvantaged groups. Accordingly, *Teal*'s rejection of an employer's bottom line focus that functions to promote a kind of group equality at the defendant's workplace appears less defensible solely as a matter of Title VII theory. Both the bottom line principle that the majority rejects, and the validation approach that the majority endorses, are inextricably linked to showings of group adverse impact and are thus justified as attempts to secure individual opportunity through improvement in group condition. The two approaches share a concern for results, and each technique tends to assess these results in terms of the condition of the group as a whole. Neither is unquestionably more attuned to the spirit of Title VII than the other.

311. See *supra* notes 303–09 and accompanying text and *infra* notes 335, 347.

312. Although unlikely, it is theoretically possible that *Teal* will be relied upon to permit white males to use disparate impact theory. An appealing context for expansion of the application of disparate impact might be a sex discrimination case in which a male seeks a traditionally female job. For example, suppose that an employer seeks to hire a receptionist and decides to give all applicants a non-job-related test, such as a shorthand test. If males as a group tend to perform worse on the shorthand test than females, the test might be challenged as discriminating against males and the employer called upon to justify the requirement. A validation requirement in this instance would probably serve to eliminate use of the shorthand test and to increase the hiring of male receptionists. It may, in general, be a wise policy to increase the number of males in predominantly female occupations and thereby help to remove debilitating sexual stereotypes that have harmed women in traditional fields. *See* Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 399, 415–27 (work assigned to women and minorities has historically been devalued) [hereinafter cited as Blumrosen, *Wage Discrimination*]. With respect to the availability of disparate impact claims for whites claiming adverse racial impact, there are few neutral selection devices (save perhaps veteran's status) that tend to advantage blacks as a group.

313. *See infra* text accompanying notes 337–41.

Both can be viewed as techniques or mechanisms designed to upgrade the status of traditionally disadvantaged groups so that, in the future, a nonillusory equality for individuals can be attained. Because both techniques are compatible with the group-oriented conception of equality underlying disparate impact theory, the choice between the two techniques should be premised on an evaluation of the practical impact of each.

3. Affirmative Action, Equal Employment Opportunity, and the Consequences of Teal for Employer Discretion

It is difficult to predict whether, in the long run, *Teal*'s preference for validation will best cure the inferior economic status of minority groups and thereby help to create a future in which meaningful equality may be secured for all individuals. *Teal*'s insistence on validation of individual components may be a wise preventive measure, cautiously designed to ferret out any possibly significant barrier to equal employment opportunity that should trigger justification. For example, the validation requirement of *Teal* could conceivably promote minority interests by providing additional protection against subtle forms of disparate treatment.[314] Moreover, the *Teal* requirement of validation also assures that the bottom line defense will not be abused by employers claiming insulation from Title VII disparate impact liability in cases in which there is no satisfactory explanation for an apparent bottom line balance, given the adverse impact of a component of the selection process.[315]

This favorable assessment of the *Teal* ruling will not hold,

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314. Although it is clear that a balanced work force does not insulate the employer who intentionally disfavors individual workers because of their race or sex, see *supra* note 291, such disparate treatment may often be hard to prove, given the elusive element of discriminatory motivation. Requiring validation, despite a bottom line balance, may serve to eliminate the more subtle attempts to deprive certain minority members of employment benefits. Such a situation might occur when an employer intentionally uses an unvalidated test to screen out black civil rights activists and then singles out the less vocal black applicants for special affirmative action treatment.

315. *See, e.g.*, I.M.A.G.E. v. Bailar, 518 F. Supp. 800, 805–09 (N.D. Cal. 1981); Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952, 963–70 (D.D.C. 1980), *aff'd*, 702 F.2d 221 (1981). Prior to *Teal*, there was a danger that a court would rely on unrefined labor force statistics to assess the availability of minority workers, see *infra* note 317, accept the employer's bottom line defense, and erroneously conclude that the employer's selection process had no significant disparate impact. *See* EEOC v. Greyhound Lines, 635 F.2d 188 (3d Cir. 1980) (no beard rule for public employees found non-discriminatory, especially since employer had higher percent of black employees in his employ than in the labor force and the general population of the area). In such "false" bottom line cases, it may be distribution of skills and opportunities in the labor market itself that serves to "inflate" the percentage of potential minority applicants and the employer's apparent bottom line balance merely reflects an inaccurate assessment of the numbers of minority members interested and available for work.

however, if the validation requirement produces a correspondingly negative impact on voluntary affirmative action, cancelling out any equality gains achieved by *Teal*. Although *Teal* did not purport to cast doubt on the legality of voluntary affirmative action beyond the mild constraints imposed by *Weber*,[316] the rejection of the bottom line principle may well discourage employers from instituting affirmative action plans to expand opportunities for minorities. Perhaps the most appealing context for application of the bottom line approach arises when an employer engages in an affirmative action program that, by any measure,[317] produces a racially and sexually balanced result. As the Supreme Court stressed in *Weber*, the aims of Title VII would not be served by placing barriers in the way of voluntary affirmative action.[318] Stated positively, an important incentive to voluntary affirmative action may stem from the employer's knowledge that it might thereby be insulated from Title VII liability, whether challenged in a "reverse discrimination" suit[319] or in a suit brought by a minority plaintiff who failed to benefit from an affirmative action program.[320]

With respect to reverse discrimination suits, *Weber* broadly

316. *See supra* note 257 and *infra* note 318.

317. Several approaches may be used to measure the "availability" of minorities to determine whether the employer has hired, promoted or otherwise selected a representative number of minorities. Courts often rely on actual applicant flow data which shows the results of the selection process for a group of applicants for the job. Using actual applicant flow data, the candidates are separated into two groups: those who are selected (*e.g.*, hired, passed test, promoted, etc.) and those who are not selected. The percentage of minority candidates selected from those in the applicant pool is then compared to the comparable percentage of nonminorities selected to determine whether the results of the selection process proportionately reflects the availability of minorities. D. BALDUS & J. COLE, *supra* note 12, at 350, 353 (Glossary).

Another approach is to construct a pool of applicants who would have applied under conditions of normal labor supply. Particularly when actual applicant flow data is unavailable or there is reason to believe that it is distorted or inadequate, resort may be had to other data. Actual applicant flow data may not be helpful, for example, because of the chilling effect of a particular selection device (e.g., a well-publicized minimum height requirement) or because of an affirmative action recruiting program. *Id.* at § 4.11. At times, labor force data of varying degrees of refinement (e.g., limited to persons of a certain age, sex, or possessing certain qualifications) or even general population data may be used to estimate the pool of actual applicants that would have existed in the absence of labor supply distortions. *Id.* at §§ 4.2, 45.21. What is generally, or in any given case, the best measure of availability is a controversy that has absorbed the courts and commentators. *Compare* D. BALDUS & J. COLE, *supra* note 12, at 4.11 (preferring applicant flow data as a general matter), *with* Lerner, *supra* note 11, at 30–32 (preferring qualified labor force statistics). *See also* Rosenblum, *The External Measures of Labor Supply: Recent Issues and Trends*, 10 CONN. L. REV. 892, 897–99 (1978) (discussing possible inadequacies of actual applicant flow data as a measure of availability).

318. *Weber*, 443 U.S. at 204–07.

319. *See infra* text accompanying notes 321–24.

320. *See supra* text accompanying notes 26–29.

insulated affirmative action programs designed to "eliminate conspicuous racial imbalance in traditionally segregated job categories."[321] In tune with *Weber*, the EEOC has also taken steps to protect the employer through adoption of its Affirmative Action Guidelines.[322] The Guidelines are of particular aid to the employer because, if the company strictly follows the Guidelines, it is entitled to invoke the good faith reliance exemption of Section 713(b)(1) of Title VII[323] and thereby immunize the affirmative action plan from legal challenge. The Guidelines, in turn, also take a generous view of the instances in which voluntary affirmative action is appropriate. Employers are permitted under the Guidelines to engage in affirmative action to eliminate adverse impact caused by existing or contemplated practices, to correct the effects of prior discriminatory practices, and to enlarge the applicant pool of available minorities and females.[324]

Neither the protection of *Weber* nor the statutory defense of good faith reliance on the Guidelines is available when, as in *Teal*, the challenge is not to the affirmative action plan but to another aspect of the selection process that operates in conjunction with the affirmative action plan to produce an overall balanced result. After *Teal*, the employer may no longer safely assume that its affirmative action plan will serve as a defense against suits by individual minority members. This is the case even though the employer is protected by *Weber* and the Guidelines from challenges by those nonminority groups not included within the plan.

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321. *Weber*, 443 U.S. at 209. For discussions of the legal limits placed by *Weber* on affirmative action programs, see Belton, *supra* note 10, at 594–96; Blumrosen, *Affirmative Action*, *supra* note 19, at 14–32; Boyd, *supra* note 134, at 18–26.

322. Affirmative Action Under Title VII, 29 C.F.R. § 1608 (1983) [hereinafter cited as Affirmative Action Guidelines].

323. Section 713(b)(1) provides:

> (b) In any action or proceding [sic] based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that . . . after such an act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

42 U.S.C. § 2000e-12(b)(1).

Section 1608.2 of the Affirmative Action Guidelines, *supra* note 322, declares that the Guidelines constitute "a written interpretation or opinion" of the EEOC and expressly triggers the protection of Section 713(b). 29 C.F.R. § 1608.2 (1979). The protection afforded to the employer who follows the Affirmative Action Guidelines is exceptional in that the EEOC has never before tied Section 713(b)'s save harmless insulation to conformance with other guidelines issued by the Commission. *See* Blumrosen, *Affirmative Action*, *supra* note 19, at 26–28.

324. 29 C.F.R. § 1608.3 (1983).

The key determination then becomes whether the additional incentive that is lost by *Teal*'s rejection of the bottom line approach will so dampen voluntary affirmative action efforts that the goal of integrating minorities into the mainstream of American society will be seriously delayed.

There can be no safe calculation of the effect of *Teal* on the quantity or form of affirmative action plans. No law prevents an employer from both validating its objective selection devices and engaging in affirmative action. Admittedly, the bottom line defense is not the only incentive to voluntary affirmative action. Some employers engage in affirmative action to meet their obligations as government contractors under Executive Order 11246.[325] Similarly, employers who use subjective or discretionary selection devices and who are concerned about Title VII disparate treatment suits may well decide to increase minority representation through affirmative action, thus attempting to negate claims of discriminatory intent.[326] Finally, it is possible that some affirmative action plans are prompted by internal company policy generated by an uncoerced desire to improve the lot of minority workers. Insofar as the impetus for engaging in affirmative action stems from the above sources, the employer is apt to keep its affirmative action program even after *Teal*.

Although *Teal* is thus unlikely to spell the end of voluntary affirmative action, there is nevertheless reason to believe that after *Teal* some significant effort that would have been devoted to affirmative action will be diverted to validation efforts especially among employers who rely on objective selection devices.[327] Em-

325. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), requires government contractors both to eliminate discrimination and to take affirmative action to correct any underutilization (i.e., underrepresentation) of minorities or other protected groups.

326. The Supreme Court in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978), declared that proof that an employer's work force was racially balanced or that it contained a disproportionately high percentage of minority employees was not "wholly irrelevant on the issue of intent." *Id.* at 580. *See also* Stevens v. Junior College Dist. of St. Louis, 548 F.2d 779, 781 (8th Cir. 1977); Robinson v. Firestone Tire & Rubber Co., 446 F. Supp. 240, 241 (W.D. Okla. 1978); Townsend v. Exxon Co., U.S.A., 420 F. Supp. 189, 193 (D. Mass. 1976).

327. Even before the Court's decision in *Teal*, the use of tests as selection devices was on the rise, Haney, *Employment Tests and Employment Discrimination: A Dissenting Psychological Opinion*, 5 INDUS. REL. L.J. 1, 2 n.4 (1982), and complaints alleging discrimination in testing accounted for some 15 to 20 percent of the approximately 70,000 complaints filed annually with the EEOC. A. JENSEN, BIAS IN MENTAL TESTING 34 (1980). *But see* Tenopyr, *The Realities of Employment Testing*, 36 AM. PSYCHOLOGIST 1120–21 (1981), indicating that testing by private employers is far from universal and that when tests are used, they are generally not the sole factor in determining employment decisions. In contrast, because of the widespread use of merit systems by government employers, Tenopyr concedes that employment testing is far more influential in the public sector than in the private sector.

ployers who rely heavily on objective selection procedures will seek out methods to insulate these legally vulnerable components of their selection process. Validation is expensive[328] and there is no litmus test for determining whether a validity study will prove adequate under *Griggs*.[329] If the bottom line defense were accepted, however, the employer would have affirmative action as a backup method to safeguard its tests should the validity studies fail to pass judicial scrutiny. Such an employer would also have the liberty to choose the validation method that would best serve its business needs, without being compelled to tailor its efforts solely to satisfy the EEOC and the courts. For example, an employer may well decide that its hiring test is economically justified and acceptable to its employees, even though the test has not been validated by professional, quasi-scientific standards. After *Teal*, the employer with such a vulnerable selection component must either secure sufficient evidence of validity or abandon the component, perhaps adopting a more subjective selection process. If validation is chosen, unless other incentives to affirmative action are present, the employer may decide to give up its affirmative action program now that the legality of its objective component will hinge solely on the legal sufficiency of the validity study.

It is nevertheless possible that a diversified selection process, consisting of testing and affirmative action components, might still be perceived as a reasonable middle course for the employer after *Teal*. Applicants and incumbent workers might tend to regard

328. *See* B. SCHLEI & P. GROSSMAN, *supra* note 12, at 103 n.60 & 181, which recounts testimony given in 1976 by Dr. Enneis, the principal drafter of the 1970 EEOC Guidelines, stating that he was aware of only three or four criterion-related validation studies which had met all of the EEOC guidelines and that one of these studies cost $400,000. *See also* Brief of the National League of Cities and the National Public Employer Labor Relations Association as Amici Curiae in Support of the Petitioners at 27, Connecticut v. Teal, 457 U.S. 440 (1982) (validation is expensive and impractical because often employers do not know whether a test has a disparate impact until after the test has been administered); United States v. New York, 829 Gov't Empl. Rel. Rep. (BNA) 47, 69 (N.D.N.Y. Sept. 6, 1979) (despite expenditure by employer of $1,250,000 to validate test, court ruled that validation study was inadequate).

329. It is often difficult to predict the outcome of a challenge to the validity of a selection device because judicial assessments of the adequacy of validation studies may be very complex. *See, e.g.*, Guardians Ass'n of the New York City Police Dep't v. Civil Serv. Comm'n of New York, 630 F.2d 79, 91–106 (2d Cir. 1980) (examination held invalid because of improper use of rank-ordering); Ensley Branch of NAACP v. Seibels, 616 F.2d 812, 816–18 (5th Cir. 1980) (criterion-related studies failed to establish validity of tests); Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350, 357–62 (8th Cir. 1980) (written—as opposed to practical—portion of exam held not content valid).

The Uniform Guidelines are also very difficult for users to comprehend. The level of reading difficulty of the Guidelines exceeds the Ph.D. level. Report by the United States General Accounting Office, EMPL. PRAC. GUIDE (CCH) ¶ 5062, at 3290–91 (July 30, 1982).

rigid quotas as unfair, yet would view a totally objective process that screens out minorities at a high rate as insensitive to the realities of society. There is no legal impediment to the institution of such a diversified process even after *Teal*, provided that the objective components of the process that carry adverse impact are validated. Once the symbiotic relationship between affirmative action and the objective component is severed, however, it is likely that employers will be tempted to protect their objective selection processes by validation alone.

In addition to discouraging the more formal affirmative action efforts by employers, rejection of the bottom line might also serve to dissuade employers from using selection methods that function as de facto affirmative action programs. In unusual cases, a balanced overall result in hiring may ensue from a hiring process that consists of components with offsetting effects on different groups that cannot be traced to any formal affirmative action efforts. For example, an employer might choose employees on the basis of two selection components—a written examination and a veterans preference.[330] Assume that in the applicant pool there is a higher percentage of black veterans than white veterans. In such a case, the veterans preference might well operate to cancel out any adverse impact on blacks arising from their relatively poor performance on the test. If the end result were a balanced work force, the employer before *Teal* might have relied on these results to save it the cost of validating the test in accordance with the prevailing law.

There is justification for immunizing such employers who expand opportunities for blacks and women, even if the expansion is not produced by a conscious affirmative action plan. Effective affirmative action activities may be quite casual in nature and there may be a reluctance to label such activities as part of any conscious plan, lest the employer be accused of reverse discrimination. A company might be more inclined to use a fortuitously offsetting factor, such as a veterans preference, at least if use of such a factor does not appreciably diminish the quality of its work force. Moreover, it is not unlikely that an employer would feel harassed if it were required to restructure its selection processes radically, using only validated devices, to achieve the balanced result that it had from the outset. When the demands of equal opportunity appear technical in nature and do not result in demonstrable numerical gains, the social values underlying those de-

330. *See* Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973), *modified*, Smith v. Troyan, 520 F.2d 492, 493 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976) (hiring of police officers based in part on veteran's preference and written examination).

mands may be obscured and any attendant interference with management prerogative will likely be received with resentment.

Without purporting to quantify the degree of harm, it is reasonable to believe that *Teal* will discourage affirmative action.[331] Unless legal and business incentives consistently favor affirmative action, businesses are likely to be indifferent to equality objectives and few can be counted upon on their own to regard the expansion of opportunities for minorities as an objective worth pursuing for its own sake. The evolution of disparate impact theory itself suggests that management indifference rather than deliberate disparate treatment accounts for much of what we now regard as discrimination in employment.[332]

If *Teal* does serve as a disincentive to affirmative action in some cases, the next inquiry is whether any corresponding increase in validation will compensate for such loss of employment opportunities for minorities. One of the assumptions providing support for proponents of validation is that the use of nondiscriminatory, valid selection devices will, over time, produce a balanced work force.[333] At first glance, the assumption seems reasonable, grounded as it is on a belief that there are no significant, inherent differences in talent, ability, or motivation that are distributed along race or sex lines. It would be unrealistic to assume, however, that the long history of employment discrimination against women and blacks will be wiped out in the next few decades sim-

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331. If the bottom line focus had been sanctioned, it would have been possible to limit Title VII disparate impact claims challenging diversified selection processes to those centering on the validity of the affirmative action program. Only if the affirmative action plan were legally vulnerable under the *Weber* standards, *see supra* note 257, would it then indirectly lose its capacity to protect the other aspects of the selection process.

332. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, PUB. NO. 70, AFFIRMATIVE ACTION IN THE 1980S: DISMANTLING THE PROCESS OF DISCRIMINATION 10 (Nov. 1981):

> Some practices that disadvantage minorities and women are readily accepted aspects of everyday behavior . . . . These actions, all of which have a discriminatory impact on minorities and women, are not necessarily acts of conscious prejudice. Because such actions are so often considered part of the "normal" way of doing things, people have difficulty recognizing that they are part of a discriminatory process and, therefore, resist abandoning them despite the clearly discriminatory results. Consequently, many decisionmakers have difficulty considering, much less accepting, nondiscriminatory alternatives that work just as well or better to advance legitimate organizational interests, but without systematically disadvantaging minorities and women.

See also Blumrosen, *Strangers in Paradise*, *supra* note 177, at 70.

333. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977) ("[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.").

ply by outlawing the use of all procedures that are not job-related and have an adverse impact. Educational deficiencies, handicaps produced by stereotyped attitudes, and the other legacies of a discriminatory past will continue for some time to limit the ability of certain groups to compete equally for benefits on the basis of job-related criteria.[334] The balanced work force promised as a by-

334. See Comments of Eleanor Holmes Norton, former Chair of the EEOC, expressing the fear that validation of tests may not result in an improvement in the status of minorities and women:

> You have a situation where the largest employer in the United States [the federal government] has managed to validate tests that have a terrible adverse effect upon minorities and women . . . . Validated to be sure according to their methodology, but it is clear that employers around the country are increasingly sophisticated in the validation of tests. Because employers make money and will learn to do what the government wants them to do. And the government says what we really want you to do is validate tests, that is what they are going to spend their money doing. And frankly, they have spent a great deal of money doing just that, and my hat is off to the psychologists. We do not see, however, comparable evidence that validated tests have in fact gotten black and brown bodies, or for that matter, females into places as a result of the validation of those tests. In other words, we do not see the kind of casual [sic] relation that I think, when the great—and I regard it as a great new enforcement tool was discovered some years ago, we do not see quite the casual [sic] relationship we had expected to see. Rather we are faced with the possible anomaly that tests could be validated and no effect or no appreciable effect flow to minorities and women, and in particular minorities, because of, perhaps, reasons more complicated than any of us understand, going at least to class and other background factors that militate against people who have come from such backgrounds taking tests as well as people who have not come from such backgrounds . . . .
>
> I think test validation gives them an A-1 out. Because if you validate your tests you don't have to worry about exclusion of minorities and women any longer, you have done what it seems to me is increasingly a fairly minimal thing to do given the sophistication of psychologists in coming up with validation. That leaves a whole generation . . . . of, particularly black and brown people to wait, . . . until their class status, their cultural opportunities, whatever it is that accounts for these disparities have caught up. Unless somebody pushes employers to find other ways other than tests to find qualified people. . . . I suppose I confess I just don't believe very much in tests, although I understand their utility. So that while I agree with both Commissioners on the importance of maintaining test validation, I suppose I disagree on the importance attached to it and in fact believe that test validation—that the employer community has now caught on to a nice new thing, and that if they continue to rely as heavily on validation, they could actually undercut the purposes of Title VII in erecting a barrier that would then be impenetrable. . . . I suppose I confess that I think we ought to be encouraging employers to look, yes, to do what they can to validate tests; but we ought to understand that in a perfect world of validated tests, we still leave most minorities at a disadvantage when compared with most whites who take tests. . . . I warn us all that in the history of reform, the great disadvantage of reformers is they stop reforming themselves . . . .

Excerpts From Transcript of EEOC Commissioners Meeting on Dec. 22, 1977, D.L.R. (BNA) No. 43, at E-1 to E-4 (Mar. 3, 1978). *See also* Committee on Ability

product of validation might well take such a very long time to emerge that generations of American workers will continue to be subjected to the inequities of a stratified workplace.[335]

Compared to validation, conscious affirmative action plans appear better suited to achieving a balanced workplace in the relatively short run.[336] If a paramount objective is to achieve balance, it seems more reasonable to embrace the bottom line focus, rather than validation, because of the former's superior ability to spur voluntary affirmative action efforts.

Pointing to the advantages of the bottom line focus as a device to speed up achievement of a balanced work force, of course, does little to dispel the fear that reliance on the bottom line will also produce the negative effect of appreciably reducing reliance on merit selection, at least insofar as merit selection can be associated with use of validated procedures.[337] Without discounting the

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Testing, Assembly of Behavioral and Social Sciences, National Research Council, Ability Testing: Uses, Consequences, and Controversies, Part I, at 146 (1982) (even highly valid tests are likely to have an adverse impact on blacks and certain ethnic minorities who continue to have a relatively high proportion of less educated and more disadvantaged members); Schmidt & Hunter, *Employment Testing—Old Theories and New Research Findings*, 36 AM. PSYCHOLOGIST 1128, 1131–33 (1981) (citing recent studies indicating that lower test scores for minorities are not attributable to test unfairness but instead reflect a societal problem that some groups of individuals are not acquiring job-related cognitive skills to the same degree as other groups).

335. *See* Blumrosen, *Wage Discrimination*, *supra* note 312, at 405 n.25 (even if discrimination were to stop immediately, it has been estimated that it would still take approximately seven generations for blacks and whites to have similar occupational distributions) [hereinafter cited as Blumrosen, *Wage Discrimination*]; L. THUROW, THE ZERO SUM SOCIETY 185 (1980) (with respect to relative earnings for full-time, full-year workers, if black males were to continue their relative progress at the pace of the last twenty years, it would take them another sixty years to catch up with white males).

336. One possible problem with permitting employers to choose affirmative action rather than validation as the means of complying with Title VII is the danger that such an affirmative action-centered hiring process will secure not only a floor of job opportunities for minority groups but will also impose a ceiling on the number of benefits obtained by such groups. Certainly when affirmative action results in a quota that operates as a ceiling, it is repugnant to Title VII's objective of removing artificial barriers to advancement of minority workers.

It seems unlikely, however, that application of the bottom line principle would necessarily mean that minority groups would suffer from an employer-constructed ceiling on opportunities. Rather, assessment of a bottom line balance may be keyed sensitively to the number of interested, available persons in the work force. If employers and courts are careful not to underestimate the percentage of Title VII beneficiaries who can be expected to seek work with the particular employer, *see supra* note 317, the bottom line focus should not take a perverse turn and function as an artificial ceiling.

337. *Cf.* Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures With Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 30–32 (1977) (bottom line focus encourages employers to devise covert quota systems composed of offsetting selection devices that have sufficient appearance of job-relatedness to withstand charges of intentional discrimination).

value of a merit-based system, however, it is important to recognize that Title VII is not a fair employment procedure law that mandates a merit system.[338] Just as no employer is required under Title VII to hire a particular person solely to achieve a more balanced work force, no individual minority applicant, no matter how objectively qualified, is guaranteed a job under Title VII. Even though Title VII may encourage merit selection as an important means to eliminate discrimination, the legislation does not require that employees be hired on the basis of their qualifications. Proof that a selection device is job related is only required if the challenger first establishes that the device has an adverse impact on the minority group.[339]

Given that neither a merit-based system generally nor a merit-based system secured by validation of selection devices is mandated by Title VII, there remains the more difficult question of whether, as a policy matter, the Court should have pronounced validation as the preferred means of achieving the antidiscrimination guarantee of Title VII. Indeed, the bottom line debate itself most sharply centers on this question of preference. Endorsement of the bottom line prnciple would have enabled the employer to choose between affirmative action and validation; in rejecting the bottom line principle, *Teal* effectively limits employer choice and commands a preference for validation.[340]

There is much to be said in both the short and long run for permitting the employer to choose which compliance technique it will use. The legislative history of Title VII discloses that a high value should be placed on management prerogative.[341] It is fair to assume that this deference to business stems not from some unthinking allegiance to pieties of the free market but from a belief that the individual employer has the motivation and is in the best position to decide which practices, including personnel practices, will be most efficient and profitable.

Although there may be little dispute that, in general, merit-based selection is good for business, there is certainly no such consensus as to what constitutes the necessary qualifications for any given job or other operational definitions of "merit".[342] Personnel

338. *See supra* notes 124–25 and accompanying text.

339. *See supra* text accompanying notes 72–75.

340. *See supra* text accompanying notes 29-42, 257-58.

341. House Judiciary Committee Rep., H.R. REP. No. 914, 88th Cong., 1st Sess. 150 (1963), at 29, *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 5, at 2150; 110 Cong. Rec. 7218, *reprinted in* EEOC LEGISLATIVE HISTORY at 3015 (Comments of Senator Clark).

342. *See* Blumrosen, *Wage Discrimination*, *supra* note 312, at 432–34. For a discussion of the complexities involved in formulating a technically adequate job description, a prerequisite of any job analysis, see R. HENDERSON, COMPENSATION MANAGEMENT 132–67 (1979).

specialists trained in industrial psychology may sometimes provide valuable education for the employer in matters of efficiency by using sophisticated validation techniques to assess personnel practices.[343] Yet given the cost of validation efforts and the nascent state of the art of validation, a reasonable employer may decide not to rely on the experts but rather to experiment with selection devices of its own choosing. It seems reasonable to encourage such experimentation by business so as to maximize the chance that innovation will lead to greater productivity.[344] In one sense, the *Teal* requirement of validation functions as a kind of technological restraint on private business in attempting to achieve the goals of Title VII. In contrast, the more result-oriented bottom line principle can be viewed as a performance standard that permits business to select the methods best designed to achieve the required performance level at the least cost.[345] The

343. But see Bartholet, *supra* note 115, at 1009, which cautions that *courts* should not uncritically accept the conclusions of testing experts. Professor Bartholet points out that testing experts tend to be employer-oriented because they are hired by employers and are "committed to the rationality of the testing devices they are trained to develop." Most significantly, testing experts are "technicians" whose expertise "gives them no basis for making the value choices that determine the legality of selection systems."

344. There is some evidence that affirmative action programs are cost efficient methods for achieving equality of job opportunity. *See Oversight Hearings on Equal Employment Opportunity and Affirmative Action, pt 1, Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 1st Sess. 359 (1981) (statement of J. Clay Smith, former Acting Chair, EEOC) (citing study by Arthur Andersen and Co. that cost of affirmative action accounts for only .07 percent of total sales of 48 companies representing more than 20 industries).

345. Performance, as compared to technological, standards have been viewed as more desirable regulatory mechanisms in other contexts. The U.S. Regulatory Council has reviewed the various federal agencies' attempts to institute "innovative regulatory techniques that depart from the rigid (command-and-control style) that dominates most Federal regulatory programs." U.S. Regulatory Council, Memorandum for the President, at 3–4 (May 30, 1980). Performance standards were classed as one of these innovative techniques:

> Performance standards are being used as alternatives to regulatory requirements that specify the exact means of compliance (prescribing, for example, exactly what technologies must be used). Agencies set general performance levels and permit the regulated entities flexibility to find and use the best ways of complying. Performance standards allow firms to minimize their own costs of compliance and permit them the flexibility to adapt to their particular business conditions.

Id. As examples of such recently introduced performance standards, the Council cited as performance-oriented standards EPA's new "bubble" policy whereby plant managers are encouraged to propose varying mixes of control for pollution sources as long as they achieve the same overall emissions level and efforts by OSHA to examine and rewrite its standards based on detailed specification language.

See also Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466, 1566 (1980) (criticizing approach of Clean Air Amendments of 1970 that prescribed particular means to reach stated antipollution objectives and endorsing more ends-oriented approach whereby Congress requires an agency to define

danger inherent in governmental imposition of a technological standard, such as validation, is that, if such a technique proves relatively ineffective, the legal machinery will not be able to respond as quickly in devising and implementing a workable substitute as could private industry.

On matters of efficiency and the related issue of what constitutes merit in any given context, a strong argument can thus be made for according employers great leeway. Profit-motivated employers have incentive to choose cost-effective procedures, including those selection devices that will increase worker productivity. With respect to expanding opportunities for minorities, however, business cannot be expected to have a similar, self-interested motivation to achieve that goal. To counteract employer indifference to equality objectives, courts may be required to intervene and dictate the use of personnel practices that will achieve equality in the workplace.

Thus, perhaps the strongest argument in favor of the bottom line principle is that courts ought to defer to employer choice whenever the employer has demonstrated that it is not indifferent to equality concerns. A good measure of an employer's concrete concern for minority interests is the existence of a valid affirmative action program that is effective enough to produce truly balanced hiring or promotion results. If the presence of a bottom line balance is regarded as evidence that the employer has accorded significant weight to equality objectives, it then seems sensible to defer to the employer's judgment as to the other, more efficiency-oriented aspects of the selection process, such as personnel testing, rather than to insist that a psychologist or other professional declare each component of the process efficient.[346]

In the last analysis, one's position on the merits of encouraging affirmative action through use of the bottom line principle or promoting merit selection by insistence on validation may rest on a prediction as to the educative effect of each approach on those who make key employment-related decisions. The validation perspective has the advantage of reinforcing the view that it is ultimately the individual worker who matters most and that undue reliance on group affiliation is counterproductive and unfair. Reliance on validation also serves to allay the tension between an

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its ends aggressively but permits more leeway in agency choice of steps to reach stated goals).

346. Even the Uniform Guidelines have recently been criticized as outdated. The American Psychological Association's Committee on Psychological Tests has informed the federal enforcement agencies that in its view "the Guidelines reflect a reliance on and use of measurement theory that does not represent the current state of research and theory in psychological testing." Report by United States General Accounting Office, EMPL. PRAC. GUIDE (CCH) ¶ 5062, at 3288 (July 30, 1982).

ultimate vision of Title VII as furthering an individualistic notion of equality of opportunity and the more explicit group focus of disparate impact theory. On the surface, at least, the validation perspective appears neutral and purports to guarantee fair selection procedures for the benefit of individual applicants.

At the same time, rejection of the bottom line may carry a negative educational impact that outweighs the beneficial teachings of validation. Insofar as the result in *Teal* instructs that employers must subordinate group equality gains to the interests that certain individuals have in merit selection, it serves to diminish the importance of the goal of expansion of opportunities for minorities as a "good" in its own right. The employer is told to be fair and merit-oriented so as not to hurt minority workers and applicants accidentally. But this tepid formulation of the equality objectives under Title VII may simply serve to promote employer indifference, an attitude that has proven particularly harmful for minority interests. Achieving a representative work force that at the same time places individual talent and other merit considerations above group ties is not easily accomplished in today's unstable economic environment.[347] Given the enormity of the task of ending racial and sexual stratification of the work force, the chances of success decrease as the end of achieving a balanced work force is pursued with less urgency and as direct efforts toward that end are made to appear less respectable. From this perspective, *Teal* may be a loss for civil rights advocates.

CONCLUSION

Nearly twenty years after the enactment of Title VII of the Civil Rights Act of 1964, critical issues remain in achieving the Act's overriding goal of equal employment opportunity for minorities and women. Still unresolved is a tension between two conceptions of equality—one individually oriented and one group-oriented—that are linked to the two theories of employer liability

347. Ross, *The Negro in the American Economy*, in A. ROSS, EMPLOYMENT RACE AND POVERTY 6 (Ross & Hill eds. 1967) (the occupational progress of blacks into jobs other than farming or domestic service has been sporadic and has halted or reversed during periods of economic decline); L. THUROW, *supra* note 335, at 63–65 (1980) (recessions negatively affect the following groups in the order of highest to lowest number unemployed: black teenagers, women, adult blacks, Hispanics, elderly whites, young whites, prime-age white males); Edwards, *Affirmative Action or Reverse Discrimination: The Head and Tail of Weber*, 13 CREIGHTON L. REV. 713, 717–18 (1980) ("[D]uring the periods of high unemployment which occurred between 1973 and 1979, blacks suffered worst in the employment market."). *But see* R. HILL, THE ILLUSION OF BLACK PROGRESS 6 (1978) (black unemployment is no longer as responsive to the state of the national economy and is transforming into a structural, or persistent, problem).

that have evolved under the Act through judicial and administrative interpretation.

This tension surfaces with particular clarity in the bottom line debate: the controversy concerning the degree to which employers should be insulated from disparate impact Title VII suits when their overall hiring or promotion processes generate a racially or sexually representative distribution of employment benefits. The Supreme Court's recent rejection of the bottom line principle in *Connecticut v. Teal*, a disparate impact case, subordinated the group interest in equal employment benefits to the interest of individual Title VII beneficiaries in fair employment procedures. It would be wrong, however, to conclude that the Court's preference for validation amounts to a rejection of the group-oriented conception of equality under Title VII. The seemingly neutral procedural requirement of validation is, in fact, triggered only by a showing of adverse impact on minorities and thus is merely one means of protecting a group interest in equality.

When read against the Court's earlier decision in *United Steelworkers v. Weber* sustaining employer-initiated voluntary affirmative action programs, *Teal* dramatically illustrates the erratic evolution of disparate impact theory and the rationale it presupposes for judicial incursion on management prerogative in order to achieve equality in employment. Most discouraging about *Teal*, especially if extended as logic would suggest, is its likely effect in diminishing legal incentives for voluntary affirmative action. As a compliance technique under Title VII, affirmative action is superior to validation in its capacity to produce substantive gains in employment opportunities for minorities and women. It would be regrettable if the demise of the bottom line principle ultimately operated to obscure the intrinsic importance of increasing employment opportunities for historically victimized groups and to discourage creative employer choice in selecting the personnel practices that will yield a representative work force.